Supreme Court, U.S.
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In The Supreme Court of the United States

BIELOMATIK LEUZE GMBH + CO.,

Petitioner,

v.

GARY FURRY and REGINE FURRY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court in a product liability action may properly exclude the opinion evidence of a safety expert after considering the expert's self-imposed limited role, where the court finds, among other things, that the expert lacked any meaningful experience with the machine in question, was unaware as to how the machine was designed for its various functions and how his proposed alternative designs would affect those functions, did not design any of his proposed alternatives for making the machine safer, did no testing as to any of the proposed alternatives, had only inspected the complex machine once, very briefly, and had not read any literature about the specific machine or the species of equipment of which it is a part.

RULES 14.1 AND 29.6 STATEMENT

The parent of petitioner Bielomatik Leuze GmbH + Co., a German corporation, is R&M Leuze GmbH + Co. KG, Damlerstrasse 10, D-72639 Neuffen, Germany. No other publicly held company owns 10 percent or more of petitioner's stock.

Matik North America, Inc. a Nevada corporation, was a defendant in the district court but was not a party to the proceeding in the court of appeals and is not a petitioner here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bielomatik Leuze GmbH+Co., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum opinion of the court of appeals (Appendix A, A1-A5) is not reported. The order of the court of appeals denying petitioner's request for panel rehearing and petition for rehearing en banc (App. H, A107-A108) is not reported.

The district court's June 4, 1999 order granting Bielomatik's motion in limine to exclude Furrys' expert witness (App. B, A6-A32) is not reported. The district court's June 4, 1999 order regarding use of the consumer expectations and/or risk-benefit tests and directing that Bielomatik file a summary judgment motion based on Furrys' lack of an expert (App. C. A33-A43) is not reported. The district court's June 4, 1999 order denying Furrys' motion for reconsideration of the court's order excluding the expert testimony of Dr. Waymon Johnston (App. D, A44-A54) is not reported. The district court's order granting Bielomatik's motion for summary judgment (App. E, A55-A103) is not reported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 21, 2002. Petitioner filed a petition for panel rehearing and petition for rehearing en banc on April 5,

2002, that was allowed by the court of appeals (App. G, A106). The Ninth Circuit denied Bielomatik's rehearing petition on May 3, 2002 (App. H, A107). This Court's jurisdiction is invoked under 28 *U.S.C.* § 1254(1).

RULE INVOLVED

Federal Rule of Evidence 702 provides:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

STATEMENT OF THE CASE

This case raises important, recurring questions relating to the scope of the district court's gatekeeping function under *Federal Rule of Evidence* 702, as originally interpreted by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L. Ed.2d 469 (1993), in a scientific context. In *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), this Court took the final step and determined that the district court's gatekeeping duty applied to all expert testimony, scientific and nonscientific, thereby

resolving the conflict that existed in certain circuits such as the Ninth Circuit, which had held that the *Daubert* criteria for expert testimony did not apply to engineering or nonscientific expert testimony.[1]

It is apparent from this case, however, that some confusion remains, at least in the Ninth Circuit, as to the scope of a district court's gatekeeping role and the deference that should be paid to the district court's determinations by the court of appeals when the district court admits or excludes expert engineering testimony. The Ninth Circuit gave no deference whatsoever to the conclusions of the district court. By the use of an unpublished memorandum decision, the Ninth Circuit seemingly has made an end run around the principles concerning a district court's gatekeeping function set forth by this Court in *Daubert* and *Kumho Tire.*

In this product liability action arising from respondent Furry's operation of petitioner Bielomatik's complex paper cutting machine, the district court as gatekeeper meticulously analyzed the proposed testimony of respondent's only expert, a safety engineer, in a 17 page order (App. B, A6), determined to exclude it, and granted summary judgment. In a terse memorandum decision of less

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[1] In *General Electric Co. v. Joiner,* 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997), the middle case of the *Daubert, Kumho Tire* trilogy, this Court held "that abuse of discretion is the proper standard by which to review a district court's decision to admit or exclude scientific evidence." 522 U.S. at 146. In *Kumho Tire,* as discussed below, this Court extended this deferential standard to the means or factors applied by the district court in making its decision to admit or exclude expert testimony. 526 U.S. at 153.

than 4 pages (App. A, A1), the Ninth Circuit reversed the orders[2] of the lower court, finding an abuse of discretion based on the lower court's "overly expansive view" of respondent's safety expert's role, and its "overly technical application" of the factors articulated in *Kumho Tire* and *Daubert*. The Ninth Circuit held that the district court should have accepted without question the expert's self-serving definition of his limited role as a safety engineer, which precluded any necessity for him either to design or to test proposed alternative configurations.

Such a determination manifestly flies in the face of this Court's pronouncements in *Daubert*, *Joiner*, and *Kumho Tire*. Because consistent application of the law in every circuit is critical to the administration of justice, the issue presented here merits further review and clarification by this Court. The facts of this case and the district court's conscientious fulfillment of its gatekeeping role present a proper foundation for the required clarification.

A. The Accident and Operative Pleadings.

In 1995, respondent Gary Furry sustained an injury to his right hand while operating a paper converting machine manufactured by Bielomatik. [App. B, A6.] Furry's own deposition demonstrated that he stuck his fingers into the moving rollers despite full knowledge of the potential danger of his action. [3 ER 785:23-787:1.] Furry had failed to

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[2] In another comprehensive order (App. D, A44), the district court denied the Furrys' motion for reconsideration of the order excluding their expert's testimony.

reinstall the safety guards on the machine after changing the printing rollers.

The Furrys filed their action against Bielomatik and its North American distributor in state court on April 26, 1996. (App. B, A7.) Bielomatik removed the action to the district court and invoked its jurisdiction under 28 *U.S.C.* § 1332, because of diversity of citizenship, the plaintiffs being citizens of California and the defendant corporations citizens of Germany and Nevada, respectively.

In the operative second amended complaint, the Furrys sued Bielomatik for damages for personal injuries based on theories of strict liability, negligence, breach of warranty, and loss of consortium. [2 ER 460.] As part of the strict liability claim, the Furrys alleged that the Bielomatik paper P-581 converting machine is a specialized, sophisticated and dangerous product that was defective in several respects including: (a) the machine failed "to perform as faithfully as an ordinary user would expect when said paper processing machine was used in a reasonably manner; the design of the machine caused Furry's injuries and "the benefits of the design of the subject machine do not outweigh the risk of dangers inherent in such designs"; the machine was defective in manufacture; the machine was defective because the defendant "failed to provide adequate instructions, directions and warnings" concerning the machine; and the machine was defective because Bielomatik "failed to adequately design, test, and install necessary safety devices and safety guards" that would have prevented the accident. [2 ER 463:18-20; 464:16-465:24.] The Furrys also alleged that the Bielomatik machine was in violation of the *Federal Occupational Safety and Health Act*, Title 29, Section 1910.212(a)(2). [2 ER 468:4-7.] The Furrys further

alleged that, despite a prior injury to another individual, Bielomatik "failed and refused to do any retrofit campaign to equip existing P-581 machines with emergency shutoff switch" and "failed to do any retrofit to equip existing P-581 machines with interlock protection guard." [2 ER 469:12-19.]

B. The Procedural History.

After deposing Furrys' only expert, safety engineer Waymon L. Johnston, Ph.D., on March 10, 1999, and after this Court issued its opinion in *Kumho Tire* on March 23, 1999, Bielomatik filed a noticed motion in limine to exclude the testimony of Johnston based on the reliability standards set forth in *Kumho Tire* and *Daubert*. [SER 1-94.][3] The Furrys opposed the motion with numerous exhibits including the entire deposition of their expert and his expert witness report. [1 ER 17-290; 4 ER 848-1121.] The district court issued a detailed 17-page order on May 17, 1999, granting Bielomatik's motion to exclude Johnston's testimony, without prejudice to the filing of a motion for reconsideration by the Furrys. (App. B, A6.)

The respondents filed a motion for reconsideration, which the district court denied on June 4, 1999. (App. D, A44.) The district court then filed its order excluding Johnston's testimony the same day. (App. B, A6.) In response to a request by Bielomatik that the district court treat its motion in limine to preclude any testimony from undesignated experts as a motion for judgment, the district

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[3] "SER" refers to Bielomatik's supplemental excerpts of record field in the court of appeals.

court issued an order directing Bielomatik to file a motion for summary judgment so that all the issues could be thoroughly considered. (App. C, A33.) Bielomatik filed the motion for summary judgment, which was heard by the district court on July 19, 1999, and taken under submission. [5 ER 1157-1170.] The district court ultimately issued its 30-page order granting summary judgment on January 26, 2001. (App. E, A55.) The court entered the order and judgment on January 29, 2001. (App. E, A55; F, A104.)

C. Furrys' Safety Expert.

As noted by the district court in its exclusion order, Johnston, the safety expert, had a Ph.D. in industrial engineering from Texas Tech University, and was a registered professional engineer and certified safety professional in Texas. (App. B, A11.) At the time he was deposed, Johnston had twenty-four years experience teaching product and occupational safety engineering at Texas A&M University. *Id.* While teaching, he consulted for various companies and law firms in the area of product and occupational safety engineering. *Id.* Dr. Johnston has been retained as an expert in approximately 2,000 litigation matters during his career, covering a wide variety of products and issues. (App. B, A11-A12.)

In this case, Dr. Johnston testified that the role of a safety engineer is to identify the hazards presented by a machine's design and, working with mechanical engineers, electrical engineers, and other members of the design team, to develop a concept or a guard or other safety device that will protect a user against the hazard. (App. B, A8-A9.) A safety engineer typically inspects equipment and presents concepts for the addition or inclusion of safety devices to

other members of the design team. (App. B, A23.) According to Johnston, the mechanical and electrical engineers actually design and test the concept, although the safety engineer will evaluate the concept to determine whether it is adequate from a safety/human factors point of view.[4] (App. B, A8-A9.) Johnston stated that safety engineers do not prepare drawings or determine design details such as electrical circuitry or the nature of the materials used in constructing the safety feature. (App. B, A9.)

D. The District Court's Orders Excluding the Expert's Testimony.

The district court reviewed Johnston's report and his deposition transcript "in some detail" and, as a result, determined that there was "no need to hold an evidentiary hearing to ascertain the opinions to which he intends to testify or the factual basis for those opinions." (App. B, A8.) After reviewing Johnston's qualifications, his perceptions as to the role of a safety engineer, and the nature of his opinions, the district court specifically found "that the opinions Dr. Johnston has proffered are not the product of the 'same level of intellectual rigor' one would expect of a safety engineer in the course of ordinary and regular duty" citing *Kumho Tire, supra,* 526 U.S. at 152. (App. B, A9.) As the district court observed:

> "While Dr. Johnston has opined that Bielomatik's paper converting machine

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[4] Johnston, however, was the only expert designated by the Furrys.

> is defective because it lacks the interlock system, he has declined to provide even the concept of an alternative design. He cannot state with any certainty how the guards and interlocks he proposes would affect the utility of the machine, nor can he identify the cost of designing and constructing such additional features. His opinions regarding the need for an emergency shut-down system, extension tools and warnings are similarly general." (App. B, A9-A10.)

Likewise, the district court also concluded that the foundation for Johnston's opinions was virtually nonexistent, and noted specifically:

> "Dr. Johnston cannot state whether he has ever examined the machine that performed the same functions as the one at issue in this litigation, and believes that if he has examined similar machines, he focused only on their printing function, not on their cutting and other functions. Dr. Johnston has testified in only one case that involved the machine similar to this one. Moreover, he bases his opinions on part on reported court cases collected and provided to him by plaintiffs' counsel. This is not the type of information on which a safety engineer would typically rely." (App. B, A10.)

In its June 4, 1999 order denying the Furrys' motion for reconsideration, the court reviewed its initial basis for granting Bielomatik's motion to exclude Johnston's testimony. (App. D, A44-A46.) While the Furrys contended

that the exclusion of all of Johnston's testimony was overbroad, they did not address the specific opinions rendered in any meaningful fashion and they did not offer any argument as to why those opinions were in fact reliable. (App. D, A46-A47.) Rather, in support of a motion for reconsideration, the Furrys submitted certain of Bielomatik's interrogatory answers and responses to requests for admissions, which they contended provided additional foundation for Johnston's opinions. Because those discovery responses were served after Johnston prepared his expert report, the Furrys argued that the responses constituted newly discovered evidence that supported the request for reconsideration. *Id.* The Furrys also cited the deposition testimony of Bielomatik's expert as somehow supporting their motion. Finally, the Furrys argued that, since they had not yet taken the deposition of Bielomatik's chief engineer, that deposition would yield yet additional information to support Johnston's opinions. (App. D, A48.)

In its order denying reconsideration, however, the district court, rejected the Furrys' arguments, stating:

> "All of the evidence plaintiff cite is potentially useful at trial to establish elements of their strict liability and negligence claims. It does not cure, however, the deficiencies in Dr. Johnston's opinions or the bases upon which they rest." (App. D, A48.)

In fact, the discovery responses on which the Furrys relied were served more than six weeks before the deposition of Johnston was taken in the case. (App. D, A49.) Thus, the information which the Furrys claimed was new, was available to Johnston at the time of his deposition.

Finally, the district court concluded its review by indicating the flaws in the Furrys' analysis and why Johnston's testimony was unreliable:

> "None of the information plaintiffs cite in their motion for reconsideration will assist Dr. Johnston in conceptualizing an alternative design for the paper converting machine, or in determining the utility of any such design. Similarly, the discovery to which they allude will not permit Dr. Johnston to address the feasibility of the emergency shut-down device he recommends, to craft specific warning language, or to support his opinion regarding the use of extension tools. Plaintiffs, in short, have failed to demonstrate that the court's earlier ruling was erroneous in whole or in part, and their motion for reconsideration must be denied." (App. D, A50.)

The district court also noted that Johnston had not even submitted a new declaration addressing any of his opinions in any greater detail. (App. D, A53.) The court then observed "that, to the extent plaintiffs seek to rely on the consumer expectations test, Dr. Johnston has presented no evidence or opinions regarding the common held expectations of individuals who work with and use Bielomatik's machine or equipment similar to it." (App. D, A54.)

While the district court's comprehensive 30-page decision granting summary judgment is included in the Appendix (App. E, A55-A103) to demonstrate the thoroughness of the district court's analysis, the question before this Court concerns the scope of the district court's

gatekeeping function and its proper exclusion of the expert testimony in this case.

E. The Ninth Circuit's Memorandum Decision Reversing the Exclusion of the Expert Testimony.

Without any substantive analysis of the district court's performance of its gatekeeping function, the Ninth Circuit accepted Johnston's concept as to his self-limited role as a safety engineer and, because "Dr. Johnston offered opinions consistent with this definition of his role," the court of appeals concluded that the district court abused its discretion in excluding his opinions. (App. A, A3-A4.) According to the Ninth Circuit, Johnston was free to testify without reference to whether his testimony was based upon sufficient facts or data, whether the testimony was the product of reliable principles and methods, or whether Johnston reliably applied the principles and methods to the facts of the case. The essence of the Ninth Circuit's opinion is as follows:

> "The district court referenced Dr. Johnston's own testimony to support its conclusion that a safety engineer must provide some details as to how proposed safety features should look and function. Dr. Johnston, however, testified that while a safety engineer determines conceptually whether a safety feature is required -- for example, whether a pinch point or some other hazard needs to be guarded -- a mechanical or electrical engineer actually designs and implements the feature. Dr. Johnston offered opinions consistent with this

> definition of his role. His failure to go further, i.e., to offer specific designs for proposed safety features, did not render inadmissible his conclusions that such features were necessary to render the machine safe. The district court's conclusion to the contrary appears to have been based upon an overly expansive view of Dr. Johnston's role as a safety expert, as well as an overly technical application of the factors articulated in *Kumho Tire* and *Daubert*." (App. A, A4.)

Thus, despite the fact that the district court, after meticulously examining Johnston's proposed testimony and opinions, determined that he lacked any meaningful experience with the paper converting machine in question, was unaware as to how the machine was designed for its various functions and whether any of his proposed safety features would affect those functions, did not design or test any of his proposed safety alternatives, and had not read any literature about the specific machine or the species of equipment of which it was a part, the district court nevertheless should have allowed Johnston to testify. Seemingly, based on the word of the expert, the Ninth Circuit would emasculate the district court's gatekeeping role and preclude the reliability analysis required by Rule 702 as defined by this Court in *Daubert* and *Kumho Tire*. Such a result would mark a return to the expressly rejected *ipsi dixit* standard for expert testimony (It is because I say it is). See *Joiner, supra,* 522 U.S. at 146. In other words, it is the expert, and not the district court judge, who decides whether the expert's methodology is reliable.

REASONS FOR GRANTING THE PETITION

Under this Court's decisions in *Daubert* and *Kumho Tire*, rule 702 of the *Federal Rules of Evidence* requires that district court judges must screen all expert testimony for reliability and relevance before such testimony may be admitted. Contrary to the suggestion of the Ninth Circuit, there is no basis in the language of Rule 702, in *Kumho Tire*, or in logic, for a trial court to abdicate its *Daubert* gatekeeping responsibility when faced with a particular type of expert testimony.

Whether an expert purports to limit the scope of his or her role is of no moment. The district court judge must perform her gatekeeping function. To allow an expert to somehow define his or her role to circumvent the district court's gatekeeping duty would eviscerate Rule 702 because the *Daubert* and *Kumho Tire* factors could be avoided whenever an expert deftly described his or her role. In effect the expert could testify based on experience without any relationship between the expert's methodology and the facts of the case. It is manifest that the applicability of *Daubert* and *Kumho Tire* should not depend upon how the expert witness himself characterizes the basis for his testimony.

The district court's opinion confirms that it diligently performed its gatekeeping function and did not abuse its discretion in concluding, on the basis of this Court's analysis in *Daubert* and *Kumho Tire*, that Johnston's testimony was unreliable and, therefore, inadmissible. The Ninth Circuit's decision simply ignores this Court's prior decisions in reaching an incorrect conclusion. The court of appeals' analysis demonstrates that at least some confusion remains

as to the scope of a district court's gatekeeping duties and this Court should act to dispel any such confusion.

I. CONTRARY TO THE IMPLICATION IN THE NINTH CIRCUIT'S DECISION, THE TRIAL JUDGE'S GATEKEEPING RESPONSIBILITY UNDER RULE 702, *DAUBERT*, AND *KUMHO TIRE*, EXTENDS TO ALL EXPERT TESTIMONY, WITHOUT LIMITATION, AND IS ESSENTIAL TO A CONSISTENT ADMINISTRATION OF JUSTICE.

Any discussion of the admissibility of expert testimony in the federal courts must begin with Rule 702 and this Court's decisions interpreting that rule in *Daubert, Joiner,* and *Kumho Tire*. In fact, Rule 702 was amended in 2000 to reflect this Court's analysis in *Daubert* and *Kumho Tire*.

In *Daubert*, this Court gave trial judges the gatekeeping responsibility to exclude unreliable expert testimony. In *Kumho Tire*, the Court clarified that this gatekeeping role applied to all expert testimony, scientific and nonscientific alike. See, *Kumho Tire*, 526 U.S. at 151-152. As the language of Rule 702 makes clear, the trial judge's gatekeeper role does not vary depending on the nature of the expert testimony. The duty to insure that an expert is properly qualified and that his or her expert testimony is both reliable and relevant applies with equal force to each and every type of expert witness.

If an expert witness such as Johnston here is relying solely or primarily on experience or education, then the witness is required to explain how that experience or education leads to the conclusions or recommendations

reached, why the experience or education is a sufficient basis for the opinion, and how the expert reliably applied the experience or education to the facts of the case. Contrary to the inference in the Ninth Circuit's opinion, the district court's gatekeeping function requires more than simply "taking the expert's word for it." See, *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311, 1319 (9th Cir. 1995) ("Daubert II") ["We've been presented with only the experts' qualifications, their conclusions and their assurance of reliability. Under *Daubert*, that's not enough."] Yet, remarkably and despite its own analysis and this observation in Daubert II, that is exactly what the Ninth Circuit would have the district court do here, let the expert limit and define his role and then let him testify without reference to a methodology applied to the facts of the case.

Moreover, in *Kumho Tire*, this Court explained that the factors to be used by the district court in performing its gatekeeping function as to the admissibility of expert testimony will depend "on the nature of the issue, the expert's particular expertise, and the subject of his testimony." 526 U.S. at 150. As this Court observed:

> "The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue. . . . [A] trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of

> the expert testimony." 526 U.S. at 150-152.

Thus, a district court is empowered with great flexibility and latitude as to how it should perform its gatekeeping function.

Prior to *Kumho Tire*, in *Joiner*, *supra*, this Court had held that the abuse of discretion standard applied to appellate review of Rule 702 admissibility determinations made by the district court. 522 U.S. at 146. In *Kumho Tire*, the Court extended this very deferential standard to the district court's selection of factors by which it evaluates the reliability of the expert's testimony. As this Court observed, "Whether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." 526 U.S. at 153. As this Court continued, "The trial court must have the same latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable." 526 U.S. at 152.

It is manifest from the Ninth Circuit's opinion that it afforded no deference whatsoever either to the district court's choice of factors in evaluating Johnston's testimony or to its determination to exclude the testimony. The Ninth Circuit's suggestion that experts themselves may somehow limit the scope of their roles in order to avoid judicial scrutiny of the reliability of their opinions would eviscerate the district court's gatekeeping role.

If the district court's reliability analysis could be limited or affected either by the expert or by counsel's choice of a particular type of expert (such as the generic safety

expert here), a district court's consistent performance of its gatekeeping role would be virtually impossible. Instead of applying the standards set forth in Rule 702, a district court would have to first make some type of vague, threshold inquiry to determine even if it should apply the standards at all. That is simply not the law with respect to the admission of expert testimony as defined by this Court.

As a part of its determination to exclude the expert's testimony, the district court in this case, as evidenced by its order (App. B, A6-A32), meticulously applied the mandates of this Court in the performance of its gatekeeping function. The Ninth Circuit's terse opinion demonstrates, at a minimum, that considerable confusion remains in the circuit both as to the nature and scope of the district court's gatekeeping function, and the deference to be given to the district court's methods and conclusions.

II. THE DECISION BELOW IS INCORRECT AND IS INDICATIVE OF CONFUSION AND UNCERTAINTY AS TO THE SCOPE OF THE DISTRICT COURT'S GATEKEEPING FUNCTION, WHICH ONLY THIS COURT CAN DISPEL AND CLARIFY.

The Ninth Circuit's decision in this case confuses the potential relevance of an expert's opinion with its reliability and would place control of the district court's gatekeeping responsibility in the hands of the expert or the counsel offering the expert's testimony. The court of appeals seemingly would allow an expert to testify in a vacuum based on generalized, nonspecific experience as to ultimate conclusions – here the safety of the machine in question – rather than based on the expert's methodology and its

application to the facts of the case that logically led the expert to his opinions in the particular case.

In essence, the expert's methodology and its application to the facts of the case provide the foundation for the expert's testimony and constitute the essence of the district court's gatekeeping responsibility to insure reliability of the expert's testimony. The Ninth Circuit would do away with the district court's gatekeeping function where an expert has some vague, self-defined limited role.

As noted above, the district court at bench used the expert's self-defined role as a benchmark for its analysis and it did not *per se* rule that his testimony was inadmissible. (App. B, A23.) Rather, the district court analyzed the nature of the proffered opinions in its Rule 702 gatekeeping role and applied the principles of *Daubert* and *Kumho Tire* to exclude the testimony because the opinions were unreliable.

Under appropriate circumstances, not present here, as where the Furrys' safety engineer worked with a mechanical or electrical engineer as a part of a team (according to his own role definition), the safety expert's testimony might well be admissible. In such a team environment, the design (and possible testing) of alternatives by the other engineers could provide the necessary foundation and methodology for the safety engineer's opinions, provided that he relied on the work of the other engineers. Otherwise, without such a methodology, the safety expert's opinions and testimony represent a classic example of *ipse dixit,* i.e., it is because I say it is.

In *Joiner, supra*, this Court rejected the suggestion that *Daubert* somehow created a clear cut distinction

between the validity of scientific methodology and the plausibility of an expert's conclusions, as follows:

> "Conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." 522 U.S. at 519.

Johnston's proposed testimony in this case is nothing more than *ipse dixit.* Johnston repeatedly expressed opinions that something different should have been done but could not specifically say how that something different should have been accomplished. Instead he deferred that decision to the manufacturer, opining that he "believes" the manufacturer must have the ability to implement his "concepts." *Daubert, Joiner*, and *Kumho Tire*, require substantially more than a mere *ispe dixit* opinion by an expert that a machine is defective before that expert is allowed to testify. In this case, Johnston described no methodology as to how he reached his various opinions and generated his "concepts." Instead, the machine is defective according to him only because he says it is.

The memorandum decision in this case ignores *Daubert, Joiner,* and *Kumho Tire.* Unlike the trial judge's order excluding the expert's testimony, which thoroughly analyzed and considered the substance of Johnston's opinions, a review of the appellate decision reveals that the

panel only looked at Johnston's qualifications and at what he said, not the methodology he used, and not his basis for saying it. However, sterling credentials are not enough. The "intellectual rigor" test enunciated in *Kumho Tire* means that an expert's outstanding qualifications will not make the expert's opinion admissible unless the expert has a valid basis for how and why he or she reached a conclusion. Experts must be prepared to establish that their conclusions were reached by methods that are consistent with how their colleagues in the relevant field or discipline would proceed to establish a proposition if they were presented with the same facts and issues. Only in that way can any measure of consistency be maintained. Johnston failed to do that here as the district court determined.

While it is true that, in some instances, an expert might be able to rely on his experience alone in a particular field to support his opinion, Johnston had no prior experience with this type of machine and had no prior experience applying interlocks to any such machines. He could not satisfy the "methodology requirement" in this case by relying on past experience (App. B, A24-A27), because he had no experience to rely on.

In addition, Johnston admittedly did not rely on the work of others and apparently did not rely on any discovery responses by Bielomatik to render his opinions. (App. D, A44-A50.) Yet the Court of Appeals referred to those unrelied upon items in footnote 2 of its opinion in order to conclude that Johnston's testimony was admissible. (App. A, A4 fn.2.)

Under the principles set forth by this Court in *Daubert, Joiner* and *Kumho Tire,* work not performed by the expert, and materials or other people's work not relied upon

by an expert, prior to the rendering of a so-called expert opinion, cannot provide the necessary foundation and methodology for the opinion to be admissible. Johnston's methodology did not support his opinions as the district court correctly concluded.

It is apparent from the Ninth Circuit's flawed analysis that some measure of confusion and uncertainty exists as to the scope of a district court's gatekeeping duties under Rule 702. This Court should intervene and make the necessary clarifications to insure an orderly administration of justice in all circuits.

III. EVEN THOUGH THE NINTH CIRCUIT'S OPINION HAS NO PRECEDENTIAL VALUE, THE QUESTION PRESENTED BY IT IS IMPORTANT.

Despite the fact that the Ninth Circuit is the largest circuit in the country and contains one of its more litigious states, California, it has not published a single decision in a products liability case dealing with the admission or exclusion of expert engineering testimony since this Court issued the *Kumho Tire* opinion in 1999. Furthermore, after *Daubert,* but before *Kumho Tire,* the circuit's only opinions in such cases held that *Daubert* did not apply to expert engineering testimony. See, for example, *McKendall v. Crown Control Corp.,* 122 F.3d 803, 806 (9th Cir. 1997). Thus, for whatever reason, systemic or otherwise, the Ninth Circuit has been reluctant to deal with the expert engineering issue after *Kumho Tire,* and district court judges in the circuit have been left to find their own way with this Court's guidance.

The court of appeals in this case lacked the courage of its convictions to publish its decision at least in part, presumably, because it lacked the time to review in detail the meticulous legal and factual analysis of the district court. Of course, the petitioner asserts that the district court accurately analyzed this Court's precedents and properly applied them to the safety expert's proffered testimony. It is manifest from the district court's order excluding the expert's testimony that the court reviewed the proffered opinions in great detail and diligently applied the law to the facts before it in a reasoned fashion. Yet, the Ninth Circuit gave no deference either to the district court's conclusion or to its methodology – failures that directly contravene the precedents of this Court. Respectfully, this Court is required to intervene in order to ensure compliance with its directives.

Given the thoroughness of the district court's analysis and its order, it is difficult to conceive either what the court did wrong or what it could have done better. Therefore, the district court's fulfillment of its gatekeeping function in this case provides a suitable basis for this Court to dispel any remaining confusion as to the gatekeeping role of trial court judges.

It is critical to an orderly administration of justice in all circuits that district courts fulfill their gatekeeping function consistently and this case provides the platform for the necessary guidance. Thus, this Court should address the important question presented by this case.

CONCLUSION

This Court decided *Daubert* in 1993, clarified it in *Joiner* in 1997, and further explained its application in *Kumho Tire* in 1999. If this case is any indication, significant discrepancies remain between district and appellate courts as to how *Daubert* should be applied consistently. Now, in 2002, this Court should speak yet one more time in order to achieve the desired uniformity in all circuits.

Accordingly, for the reasons set forth above, a petition for writ certiorari should be granted.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT

FOR THE NINTH CIRCUIT

GARY FURRY and REGINE FURRY, Plaintiffs-Appellants, v. BIELOMATIK, INC., BIELOMATIK-VINTON, INC., a corporation, Defendant/Appellee.	No. 01-55442 D.C. No. CV 98-2600-MMM (Filed on March 21, 2002) MEMORANDUM* (FILED March 21, 2002)

Appeal from the United States District Court
for the Central District of California
Margaret M. Morrow, District Judge, Presiding

Argued and Submitted March 5, 2002
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Before: WARDLAW and W. FLETCHER, Circuit Judges, and FOGEL, District Judge**

Gary Furry ("Furry") and his wife Regine Furry (collectively "the Furrys") appeal the district court's summary judgment against them and in favor of Bielomatik, Inc. ("Bielomatik"). The Furrys sued Bielomatik for products liability and related claims following a workplace accident in which Furry lost the fingers of his dominant right hand after they were crushed between the rollers of a Bielomatik paper converting machine.[1] We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's decision to grant summary judgment. Kohler v. Inter-Tel Techs., 244 F.3d 1167, 1171 (9th Cir. 2001). Because we conclude that the district court should not have excluded the opinion evidence of the Furrys' only expert witness, we vacate the judgment and remand for further proceedings.

The district court excluded the subject expert opinion under Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999) and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), then granted summary judgment for

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** The Honorable Jeremy Fogel, United States District Judge for the Northern District of California, sitting by designation.

[1] A paper converting machine is a multi-function machine which customizes paper products.

Bielomatik on the ground that the Furrys could not prevail on their claims absent expert opinion evidence. The Furrys' expert, Dr. Waymon Johnston, is a safety engineer who has taught and consulted in his field for more than twenty years and who has testified as an expert witness in numerous cases. He opined that the Bielomatik machine should have been equipped with four different safety features: "interlocked" safety guards which would have prevented the machine from operating unless safety guards were in place; an emergency shut-off device which would have allowed Furry to shut down the machine when his hand was caught; a "hickey picker" extension tool used to pick material out of the machine's rollers; and warnings regarding operation of the machine. The district court concluded that Dr. Johnston was qualified to give expert opinions on the issue of safety, but that his opinions in this particular case failed to meet the standards set forth in Kumho Tire and Daubert because he failed to offer specific details regarding the design of proposed safety features or the language of proposed warnings.

Were we in agreement that Dr. Johnston's role as a safety engineer required him to provide the type of details identified by the district court, we would have no difficulty affirming the district court's decision to exclude his opinions. The district court's exclusion order clearly and painstakingly highlights the absence of design details in Dr. Johnston's written report and deposition testimony. Where the district court erred was in determining that Dr.

Johnston's opinions had to include such details in order to be admissible. The district court referenced Dr. Johnston's own testimony to support its conclusion that a safety engineer must provide some details as to how proposed safety features should look and function. Dr. Johnston, however, testified that while a safety engineer determines conceptually whether a safety feature is required -- for example, whether a pinch point or some other hazard needs to be guarded -- a mechanical or electrical engineer actually designs and implements the feature. Dr. Johnston offered opinions consistent with this definition of his role. His failure to go further, i.e., to offer specific designs for proposed safety features, did not render inadmissible his conclusions that such features were necessary to render the machine safe. The district court's conclusion to the contrary appears to have been based upon an overly expansive view of Dr. Johnston's role as a safety expert, as well as an overly technical application of the factors articulated in Kumho Tire and Daubert.[2] The district court therefore abused its discretion in excluding his opinions. The district court's decision to grant summary judgment in favor of Bielomatik

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[2] The district court correctly held that ultimately it was the Furrys' burden to provide evidence of available alternative designs incorporating the safety features identified by Dr. Johnston. This conclusion, however, did not mean that Dr. Johnston had to provide such evidence in order to be permitted to testify as an expert witness. The Furrys did in fact provide evidence as to these matters by other means, including Bielomatik's own discovery responses.

was based solely upon its conclusion that the Furrys could not prevail on their claims once Dr. Johnston's opinion evidence had been excluded. Accordingly, the judgment of the district court is vacated, and the matter is remanded to the district court for further proceedings.

VACATED and REMANDED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GARY FURRY and REGINE FURRY, Plaintiffs, vs. BIELOMATIK, INC., a corporation, aka BIELOMATIK LEUZE GMBH & CO., and MATIK NORTH AMERICA, Defendants.	CASE NO. CV 98-2600 MMM (Anx) ORDER GRANTING DEFENDANT'S MOTION IN LIMINE TO EXCLUDE PLAINTIFFS' EXPERT WITNESS (FILED June 4, 1999)

In May 1995, plaintiff Gary Furry sustained an injury to his right hand while operating a paper converting machine. Plaintiffs allege that the manufacturer, defendant Bielomatik Leuze GMEH & Co., defectively designed the machine by failing to include an interlocked protection guard over the printing rollers, and by failing to warn users

adequately of the risks involved in its operation.[1] An interlocked protection guard prevents the machine from being operated unless the guards are completely and properly attached.[2]

Plaintiffs sued Bielomatik and its North American distributor in state court on April 26, 1996. Defendants removed the action ,to this court on January 7, 1997. On September 8, 1997, the court granted plaintiffs' motion for leave to file a first amended complaint alleging claims for strict liability, negligence, breach of warranty and loss of consortium. Approximately a year later, plaintiffs sought leave to file a second amended complaint alleging a claim for punitive damages. They asserted that a recent discovery response by Bielomatik revealed that the company had the technology available to install interlocked protection guards at the time it sold tile machine to Gary Furry's employer.[3] The court granted plaintiffs' motion, and they filed a Second Amended Complaint on May 3, 1999.

Bielomatik has now moved to exclude the testimony of plaintiffs' expert, Dr. Waymon Johnston on the basis that it is not sufficiently reliable to be admissible under Federal Rule of Evidence 702, Daubert v. Merrell Downey Record

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[1] Plaintiffs' First Amended Complaint, ¶ 12(a)-(e).

[2] *Id.*, ¶ 12(e).

[3] Plaintiffs' Motion For Leave To File Amendment To First Amended Complaint and Declaration of Al Schallau at 6:4-17.

(sic) Pharmaceuticals, Inc., 509 U.S. 579 (1993) and Kumho Tire Co., Ltd., v. Carmichael, 119 S.Ct. 1167 (1.999). Dr. Johnston submitted an expert report on December 30, 1998, and was deposed on March 10, 1999. The court has reviewed both Dr. Johnston's report and his deposition transcript, which set forth his opinions and the basis for them in some detail. Consequently, there is no need to hold an evidentiary hearing to ascertain the opinions to which he intends to testify or the factual bases for those opinions.

Dr. Johnston is a safety engineer who has taught and consulted in the field for many years. He has testified as an expert witness in numerous cases over the last 24 years with respect to a variety of products and equipment. Bielomatik does not challenge Dr. Johnston's qualifications to testify. Rather, it asserts that his opinions in this case lack evidentiary reliability because he has not created an alternative design for the machine in question, has not tested the machine or any alternative design, and has performed no studies to determine the utility of any alternative design.

Dr. Johnston testified that the role of a safety engineer is to identify the hazards presented by a machine's design, and, working with mechanical engineers, electrical engineers and other members of the design team, to develop a concept for a guard or other safety device that will protect against the hazard. The mechanical and electrical engineers actually design and test the concept, although the safety engineer will evaluate it to determine whether or not, it is

adequate from a safety/human factors point of view.[4] Dr. Johnston stated that safety engineers do not prepare drawings or determine design details such as electrical circuitry or the nature of the materials used in constructing the safety feature.[5]

The Supreme Court in Kumho directed that district courts scrutinize the proposed testimony of an expert witness to ensure that the witness is using "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho, *supra*, 119 S.Ct. at 1176. Based on Dr. Johnston's description of a safety, engineer's normal role in the design process, it appears that construction and testing of an alternative design are not necessarily required in the context of the relevant discipline. Bielomatik's objection on this score, therefore, misses the mark.

Nonetheless, the court finds that the opinions Dr. Johnston has proffered are not the product of the "same level of intellectual rigor" one would expect of a safety engineer in the course of his ordinary and regular duties. While Dr. Johnston has opined that Bielomatik's paper converting machine is defective because it lacks an interlock system, he has declined to provide even the concept of an alternative

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[4] Deposition of Waymon L. Johnston ("Johnston Depo.") at 71:20-72:16.

[5] *Id.* at 72:21-73:5.

design. He cannot state with any certainty how the guards and interlocks he proposes would affect the utility of the machine, nor can he identify the cost of designing and constructing such additional features. His opinions regarding the need for an emergency shut-down system, extension tools axed warnings are similarly general.

Furthermore, the foundation for Dr. Johnston's opinions is weak. Dr. Johnston cannot state whether he has ever examined a machine that performs the same functions as the one at issue in this litigation, and believes that if he has examined similar machines, he focused only on their printing function, not on their cutting and other functions.[6] Dr. Johnston has testified in only one case that involved a machine similar to this one.[7] Moreover, he bases his opinions in part on reported court cases collected and provided to him by plaintiffs' counsel. This is not the type of information on which a safety engineer would typically rely.[8]

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[6] *Id.* at 179:20-180:2.

[7] *Id.* at 60:25-61:6. The machine at issue in the prior case was a printing press, Dr. Johnston has examined printing presses three or four times for litigation purposes, (*Id.* at 61:21-62:2).

[8] Dr. Johnston testified that it is important for a safety engineer to be aware whether a product has been involved in litigation through legal reporters, trade publications and internal company discussions. See Johnston Depo. at 126:24-128:22. The type of generalized knowledge regarding litigation within the industry Dr. Johnston referenced is of a

Consequently, the court finds that Dr. Johnston's testimony lacks sufficient in reliability to permit its presentation to the jury, and grants Bielomatik's motion as a result.

I. FACTUAL BACKGROUND

A. Dr. Johnston's Qualifications

Johnston has a Ph.D. in industrial engineering from Texas Tech, and is a registered professional engineer and certified safety professional in that state. He has twenty-four years experience teaching product and occupational safety engineering at Texas ABM University.[9] While teaching, he consulted for various companies and law firms in the area of product and occupational safety engineering.[10] Dr. Johnston has been retained as an expert in approximately 2,000 litigation matters during his career, covering a wide variety

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different character than the specific review of case files, pleadings and opinions in which he engaged here. Moreover, knowledge of the kinds of accidents that have been caused by particular types of equipment is not a basis for forming an opinion about the safety devices necessary on a particular machine. Rather, it is part of the background knowledge a safety engineer would bring to review of a machine's design. The review itself would generate opinions about the necessity of guarding or interlocking.

[9] Johnston Depo, at 12:11-25.

[10] *Id.*.

of products and issues.[11] Currently, he serves on the safety committee of the American Society of Testing Materials.[12]

B. Dr. Johnston's Opinions

Dr. Johnston intends to testify that the paper converting machine at issue was defective because it did not have an interlocking protection system. or art emergency shut-down switch.[13] Additionally, he will opine that Bielomatik's warnings were inadequate, and that it should have provided an extension tool known as a "hickey picker" with the machine when it was sold.[14]

C. Basis For Dr. Johnston's Opinions

1. Interlocking Protection Guards

During his deposition, Dr. Johnston testified that "conceptually" he believed there should have been an interlock at the guard on the ruling tower that covered the printing cylinder similar to the five interlock limit switches found on the machine.[15] He testified that Bielomatik had the

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[11] *Id.* At 21:3-10, 27:3-42:14.

[12] *Id.* At 26:15-18.

[13] Plaintiffs' Exhibits in opposition to Motions in Limine ("Pls.' Ex."), Ex. 1 at p. 7.

[14] *Id.* at pp. 7, 15.

[15] Johnson Depo. at 156:22-157:3, 165:4-17.

technological expertise and knowhow in 1978 to interlock the safety guards on the printing rollers, and therefore should have included such a safety device on the machine at issue.[16]

Dr. Johnston said that he had not studied the other limit switches, and that, while he advocated the inclusion of an interlock that had the same conceptual purpose (i.e., to shut down the machine if the guard was not attached) as the limit switches with which the machine was equipped, he did not necessarily believe it should operate conceptually in the same manner they did.[17] He indicated that he had not designed a specific interlock because he believed Bielomatik had the expertise to consider me options and decide which was best.[18] He could not identify a specific interlock that would have worked on the particular guards in question.[19] Additionally, he could not state how many interlocks there should have been or where they should have been placed. He said he had not studied those issues.[20] Dr. Johnston also could not comment on whether he thought the system should

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[16] *Id.* at 158:3-4, 163:10-13.

[17] *Id.* at 157:5-23, 158:23-24.

[18] *Id.* at 165:20-25.

[19] *Id.* at 266:2-13.

[20] *Id.* at 166:25-167:5, 168:16-17, 174:25-175:4, 175:21-25.

be mechanically or electrically powered.[21] Ultimately, he stated that the "concept . . . [he could approve was] one in which the machine will not operate unless the lid . . . or guard is in place.[22]

In support of these opinions, Dr. Johnston cited the fact that one of Bielomatik's competitors, Heidelberg, had interlocked safety guards over the in-running nip points on its printing presses at the time Bielomatik sold the machine in question.[23] This demonstrated, in his view, that Bielomatik could similarly have equipped its machine.[24] Dr. Johnston, however, admitted that he had not reviewed the "particular design" of the Heidelberg machine,[25] and thus could not "approve" its interlocking design.[26] Nor could he state that the interlocking system used by Heidelberg would have been, appropriate for the Bielomatik machine at issue.[27] Rather, he testified that he approved and "complimented"

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[21] See *Id.* at 165:18-20, 166:4-14, 170:18-172:2.

[22] *Id.* at 172:24-175:2. See also 172:2-3.

[23] Pls.' Ex. 1 at p. 11; Johnston Depo. at 160:2-19.

[24] Johnston Depo. at 160:2-19.

[25] *Id.* at 161:1-3.

[26] *Id.*

[27] *Id.* at 164:11-14.

Heidelberg's "decision" to interlock the safety guards.[28] Dr. Johnston "assumed that a reputable company [like Heidelberg] would do the proper testing and make sure that it was a good design . . . but [stated that he couldn't] compliment a design [he had] not seen."[29] Similarly, Dr. Johnston stated that he reviewed the design plans for machines manufactured by Miehle-Goss-Dexter arid Roland Offsetmaschinenfabrik.[30] As respects Miehle, he testified that the drawing he saw was complex, and that he could not identify the interlocking guards on the machine from looking at it.[31] Dr. Johnston also stated that he did not know if the Miehle machine performed all the functions performed by Bielomatik's.[32]

Dr. Johnston inspected the Bielomatik machine on only one occasion, for an hour and twenty minutes, prior to rendering his opinions.[33] He believes that he previously inspected a machine like the Bielomatik, although he stated

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[28] *Id.* at 161:16-17; 164:17-24.

[29] *Id.* at 165:6-9.

[30] Pls.' Ex. 1 at p. 11.

[31] Johnston Depo. At 254:13-21.

[32] *Id.* at 262:1-3.

[33] *Id.* at 174:12-16.

that it could have been a printing press.[34] He has been involved in one other case involving a printing press, and has examined printing presses only three or four times in the past.[35]

Dr. Johnston stated that he knew of no adverse consequences to interlocking the guard, but acknowledged that he had not performed any studies to determine whether the utility of the machine would be affected.[36] He also conceded that his opinion respecting utility reflected the perspective of a safety engineer and that "there is always [a] conflict[ ] between productivity and some other aspect."[37] With respect to the cost of interlocking the Bielomatik machine in the early 1980s, Dr. Johnston stated that he had checked the price of interlock equipment in current catalogues, and assumed that they were "even less" in the 1980s.[38] The price he postulated was not based on any of the information he obtained from the catalogues, but was based simply on his training and experience dealing with

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[34] *Id.* at 66:5-67:8.

[35] *Id.* at 60:25-62:13.

[36] *Id.* at 159:8-25.

[37] *Id.* at 159:1.6-17.

[38] *Id.* at 180:25-181:6.

interlocks.[39] The price was only for the interlock itself; Dr. Johnston did not know what the circuitry and related work would cost.[40] Ultimately, he opined that whatever the cost of the interlock system, it would be "negligible compared to the total cost of the machine."[41]

2. Emergency Shut-Down System

Dr. Johnston's second opinion is that the Bielomatik machine should have been equipped with an emergency shut-down device of some sort. He testified that the E-stop should have been a "pull cord all the way across the entire front of the roller."[42] Dr. Johnston testified that another of the machines at Mead Products[43] was equipped with pull cords. He did not know, however, whether they were placed on the machine by the manufacturer, Hichok, or by Mead.[44]

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[39] *Id.* at 182:14-21. At a later point, Dr. Johnston stated that the price quote he gave was based on the testimony of industry representatives he had read and on discovery from other matters. See *id.* at 183:12-19.

[40] *Id.* at 181:15-182:8.

[41] *Id.* at 183:23-24.

[42] *Id.* at 204:17-18.

[43] Mead Products was the company where plaintiff Gary Furry worked.

[44] *Id.* at 205:17-206:3.

Nor did he know when the machine was manufactured.[45] And, while Dr. Johnston testified to a reasonable degree of safety engineering certainty that Furry's injuries would have been less had the machine been equipped with a pull cord,[46] he could not say how quickly the machine would have stopped and acknowledged that he had performed no tests to determine that.[47]

3. "Hickey Pickers"

Dr. Johnston also testified that Bielomatik was negligent for failing to provide a "hickey picker" with its machine.[48] A hickey picker is an extension tool used to "pick" material from the printing rollers.[49] Dr. Johnston has seen only one "hickey picker'," and stated that he did not have any opinion as to what the actual design of the tool should be.[50] He also stated that he did not know whether "hickey pickers" were generally constructed by the

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[45] *Id.* at 206:4-6.

[46] *Id.* at 222:5-10.

[47] *Id.* at 224:13-22.

[48] *Id.* at 194:7-11, 197:25-198:4.

[49] *Id.* 190:5-7.

[50] *Id.* at 189:24, 191:1-6.

manufacturer of the machine or by the company using it.[51] Finally, Dr. Johnston had no opinion as to the material that should be used in constructing the tool, and stated that "[t]he actual design of it wasn't important to [him]."[52] He noted once again that, as the manufacturer of the machine, Bielomatik was in a better position than he was to design the tool."[53]

4. Warnings

Dr. Johnston's final opinion is that Bielomatik should have provided instructions, directions or warnings concerning the need to install interlocks on the guards of the machine. He also asserts that Bielomatik should have placed owners of the machine on notice that interlocks were available for the safety guards and that they should be installed on all existing machines.[54]

II. DISCUSSION

A. Admissibility Of Expert Testimony Under *Daubert* and *Kumho*

In 1993, the Supreme Court held that "Federal Rule of Evidence 702 imposes an obligation upon a trial judge to

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[51] *Id.* at 191:10-12.

[52] *Id.* at 193:2-25.

[53] *Id.* at 194:7-13, 195:9-12.

[54] Pls.' Ex. 1 at p. 14.

'ensure that arty and all scientific testimony . . . is not only relevant, but reliable.'" *Daubert, supra*, 509 U.S. at 589. Thus, the Court interpreted Rule 702 as establishing two tests that must be met before expert testimony is admissible – reliability and relevance. *Id.* at 590-91.

In the case of scientific knowledge, the Court held that a district judge faced with a proffer of expert scientific testimony must, at the outset, assess whether the reasoning or methodology underlying the testimony is scientifically valid and whether it can be applied to the facts of the case at hand. *Id.* at 592-93. To assist the court in performing this function, the Court identified a non-exclusive list of factors that should ordinarily be considered in evaluating the validity of an expert's scientific reasoning: (1) whether the theory or technique can be, or has been, tested; (2) whether it has been subjected to peer review and publication; (3) whether it has a known or potential rate of error; and (4) whether it has been generally accepted by the scientific community. *Daubert, supra*, 509 U.S. at 593-94. The Court emphasized that the analysis is a "flexible" one, and that its "overarching subject" is the "evidentiary relevance and reliability . . . of the principles that underlie a proposed submission." *Id.* at 594-95. "The focus," it noted, "must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 595.

Following *Daubert*, there was substantial debate as to whether its holding was limited to testimony of a scientific nature, or ended to testimony based on "technical" and

"other specialized knowledge" as well. See Fed.R.Ev*Id.*702. The Ninth Circuit, among others, held that Daubert was-to be used only in evaluating expert scientific testimony. See, e.g., McKendall v. Crown Control Corp., 122 F.3d 803, 806 (9th Cir. 1997). Earlier this year, the question was answered definitively and to the contrary by the Supreme Court in Kumho.

In Kumho, the Court held that the district court's "basic gatekeeping obligation . . . applies to all expert testimony." Kumho, *supra*, 119 S.Ct. at 1174. Thus, whether an expert's knowledge is scientific, technical, or specialized, the court must determine if "the factual basis, data, principles, [or] methods" that underlie his or her testimony "ha[ve] 'a reliable basis in the knowledge and experience of the [relevant] discipline.'" *Id.* at 1175. In making this assessment, the court "may" consider the factors set forth in Daubert to the extent they are pertinent in evaluating the reliability of the testimony being proffered. See *Id.* ("Our emphasis on the word 'may' thus reflects Daubert's description of the Rule 702 inquiry as 'a flexible one.'. . . Daubert makes clear that the factors it mentions do not constitute a 'definitive checklist or test.'. . . '[T]he factors identified in Daubert may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony.'. . . [M]uch depends upon the particular circumstances of the particular case at issue"). Because of the flexible nature of the inquiry, however, "the trial judge

must have considerable leeway in deciding . . . how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in Daubert where they are reasonable measures of the reliability of expert testimony." *Id.* at 1176. See also *Id.* (" . . . [W]hether Daubert's specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine").

Ultimately, the district court must determine "whether th[e] particular expert ha[s] sufficient specialized knowledge to assist the jurors 'in deciding the particular issues in the case.'" *Id.* at 117$. Thus, the court must inquire not whether the expert's basis for forming an opinion can generally be used, but whether it is properly employed in the particular case. *Id.*

B. Application Of The *Daubert/Kumho* Test To Dr. Johnston's Testimony

In this case, the issues to which Dr. Johnston's testimony is pertinent are (1.) whether the design of the Bielomatik paper converting machine is defective because the guards over the i printing rollers axe not interlocked, there is no emergency shut-down system or pull cord, and Bielomatik did not provide an extension tool or "hickey picker" with the machine; and (2) whether the warnings Bielomatik provided with the machine were adequate and whether it had an obligation to provide additional post-sale warnings about the availability of interlocked guards. In determining whether Dr. Johnston's testimony is admissible,

therefore, the inquiry must be whether he can reliably determine that the machine is defective and the warnings inadequate. Cf. *Kumho*, *supra*, 119 S.Ct. at 1177 ("The relevant issue was whether the expert could reliably determine the cause of the tire's separation"). Using either the *Daubert* factors or other indicia of reliability, the court concludes that he cannot.

As noted above, the *Daubert* factors are not meant to be mechanically applied. Rather, they should be used to the extent they will assist in assessing reliability under Rule 702. Bielomatik argues that because Dr. Johnston failed to develop arid test an alternative design, and because he lacks the technical expertise to implement any proposed design changes, his testimony is unreliable and must be excluded. While the testing of an expert's theory is one of the factors cited in *Daubert*, it does not follow that testimony *must* be excluded simply because the expert failed to conduct tests. This is the essence of *Daubert* and *Kumho*'s statement that the inquiry is a flexible one, and that the court must use the factors that will provide a reasonable measure of reliability in any given case.

Dr. Johnston testified that safety engineers typically inspect equipment and present concepts for the addition or inclusion of safety devices to other members of the design team. According to Dr. Johnston, the designers then prepare detailed drawings implementing the concept, identify the materials to be used in constructing the safety device, and fabricate the device. Using Dr. Johnston's description of a

safety engineer's role as a benchmark, the court cannot say that his testimony is *per se* unreliable because he failed to build and test an alternative machine design including interlocked guards. See *Kumho*, *supra*, 119 S.Ct. at 3.175 ("In [some] cases, the relevant reliability concerns may focus upon personal knowledge or experience"); *Id.*, 119 S.Ct. at 11767 (discussing application of the *Daubert* factors to "an engineering expert's experience-based testimony"); *McKendall*, *supra*, 122 F.3d at 805, 807 (holding that an engineer's testimony that a safety device was feasible was reliable since it was based on experience derived from investigating hundreds of forklift accidents over a period of thirty years, and rejecting the argument that the engineer's failure to build and test the safety device rendered it unreliable);[55]

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[55] *McKendall* was decided before *Kumho*, at a time when the Ninth Circuit held that *Daubert* was "confined to the evaluation of 'scientific' expert testimony," *McKendall*, *supra*, 122 F.3d at 806. After *Kumho*, of course, McKendall's statement that the *Daubert* factors may not properly be used to evaluate testimony based on "technical or other specialized knowledge" is not good law. The *McKendall* court noted, however, that *Daubert* gave "strong advice to district courts: in ruling on admissibility, trial judges are the gatekeepers and should pay particular attention to the reliability of the expert and his or her testimony . . . In that sense, *Daubert* applies to all expert testimony." *Id.* at 806. n. I. Thus, *McKendall* recognized the district court's gatekeeper role, and is to this extent consistent with the Supreme Court's decision in. *Kumho*. Post-*Kumho*, *McKendall* stands for he proposition that experience-based testimony is not per se excludable simply because the expert has not engaged in testing, Indeed, the *McKendall* court stated that, had the

Watkins v. Telsmith, 121 F.3d 984, 992 (5th Cir. 1997) ("This is not to say that alternative product designs must always be tested by a plaintiff's expert"); *Cummins v. Lyle Industries*, 93 F.3d 362, 369 (7th Cir. 1996) ("We do not mean to suggest . . . that hands-on testing is an absolute prerequisite to the admission of expert testimony").

Rather, Dr. Johnston's failure to build or test an alternative design is but one factor to consider in assessing the overall reliability of his testimony. See, e.g., *Jaurequi v. Carter Manufacturing Co.*, 1999 WL 185046, * 3, 7 (8th Cir. 1999) (*post-Kumho* decision affirming the exclusion of engineer's testimony, *inter alia*, because he did not design, draw, construct or test a proposed safety device); *Peitzmeier v. Hennessy Industries*, 97 F. 3d 293, 297-98 (8th Cir. 1996) (affirming the trial court's exclusion or expert testimony where the expert had "neither designed nor tested" the proposed safety devices, but had made only "rough sketches" of the designs that had not been subjected to peer review and could not be evaluated for their "general acceptance"). Here, it cuts against the reliability of the expert testimony plaintiffs wish to proffer.

Other factors similarly indicate that Dr. Johnston's testimony is not reliable. As suggested by the Court in *Kumho*, where an engineering expert proposes to give "experience-based testimony," it is frequently helpful to ask

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district court excluded the expert's testimony on the basis of Rule 702, and not referenced *Daubert*, it would still have concluded that the court abused its discretion. *Id.* at 808, n. 3.

whether the methodology being employed is generally accepted in the relevant engineering community, and "whether (the expert's) preparation is of a kind that others in the field would recognize as acceptable." *Kumho, supra*, 119 S.Ct. at 1176. See also *Daubert, supra*, 509 U.S. at 589 ;noting that "'general acceptance' can yet have a bearing on the [reliability] inquiry"). Ultimately, the pertinent question is whether the expert has employed "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id.* Judged against Dr. Johnston's own description of a safety engineer's role, the work he has done in this case is inadequate to support the opinions he proposes to offer.

Dr. Johnston testified that it is a safety engineer's job to identify the hazards presented by a machine's design, and, working with design team members, develop a concept for a guard or other safety device that will protect against the hazard. Clearly, in his view, the safety engineer's function is to conceptualize what the safety device should look like and how it should function. Yet Dr. Johnston has not done that in this case. While he testified that "conceptually" he believed the guard on the ruling tower that covered the printing cylinder should be interlocked, he has no specific type or design of interlock in mind. It may be that safety engineers do not themselves create detailed drawing; or design the details of any particular safety device they recommend. But they must be able to describe the type of device they have in mind with sufficient particularity that

others may do so. Dr. Johnston cannot state how many interlocks there should be or where they should be placed. He cannot identify a type of interlock that will work with the guards already on the machine. His "concept," in short, is the exceedingly and overly general one that the guards should have been interlocked. This does not reflect the "level of intellectual rigor that characterizes . . . practice . . . in the . . . held." *Kumho*; *supra*, 119 S.Ct. at 1176. See *Stancyk v. Black & Decker, Inc.*, 836 F.Supp. 565, 566 (N.D. Ill. 1993) (expert's testimony was unreliable because, by his own admission, he had "come up with a concept . . . that is not fully defined, fully proven [or] fully documented"). Compare *McKendall*, *supra*, 122 F.3d at 807 (expert's testimony that he would have designed the vehicle to allow only two to three inches of roof crush was admissible). Nor does it permit peer review of the concept he proposes, by Bielomatik's expert or anyone else. See *Daubert*, *supra*, 509 U.S. at 593.

Additionally, Dr. Johnston cannot state with any certainty whether interlocking the guards would have an impact on the utility of the machine or what their cost would be. These are matters that a safety engineer must take into account in recommending a particular safety device concept. See *Jaurequi*, *supra*, 1999 WL 185046 at * 7 [The expert] has not attempted to construct or even draw the suggested device, much less test its utility as a safety device or its compatibility with the [equipment's] proper function"); *Navarro v. Fuji Heavy Ind., Ltd.*, 117 F.3d 1027, 1031 (7th

Cir. 1997) (excluding expert testimony where there was no evidence that other engineers believed the hazards were "worth guarding against and if so by what means, or that Fuji could have redesigned the suspension to avoid the hazard at a cost commensurate with the expected accident cost, which might reasonably have seemed slight – or indeed at any cost").

Dr. Johnston attempts to support his opinion by pointing to the fact that a Bielomatik competitor, Heidelberg, used interlocked guards on its printing press during the relevant period. Dr. Johnston admits, however, that he has not reviewed the design or the Heidelberg machine or the interlock system it uses, and cannot state whether the interlocks could be used on the Bielomatik paper converting machine. Rather, Dr. Johnston limits himself to "complimenting" Heidelberg's "decision" to interlock the guards. Similarly, while Dr. Johnston's report states that a July 1963 Miehle-Goss-Dexter design plan "shows an electrically interlocked cylinder guard for a Miehle vertical printing press,"[56] and that a Roland Offsetmaschinenfabrik design plan "shows a limit switch for a Miehle printing press,"[57] he cannot identify the interlock system used by Miehle, and does not know whether Miehle's equipment performs the wane functions as Bielomatik's paper

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[56] Pls.' Ex. 1 at p. 11.

[57] *Id.*

converting machine. This is not sufficiently reliable support for the opinion he seeks to give. See *Watkins, supra*, 121 F.3d at 992 ("the fact that [the expert] had 'seen' conveyors with hydraulic cylinders, outriggers, and stop-plates, without more information regarding the types of conveyors and their intended functions, does not save his testimony from its lack of empirical support").

Dr. Johnston inspected the Bielomatik machine only once, for approximately one hour and twenty minutes, and has not read any literature about the specific machine or the species of equipment of which it is a part. See *Cummins, supra*, 93 F.3d at 370 (excluding an expert's testimony because he not only had conducted no testing of his proposed alternative design, but had "not read any studies, surveys or analyses of how [the] type of machinery is designed or manufactured or used"). This is not "preparation of the kind that others in the [safety engineering] field would recognize as acceptable." *Kumho, supra*, 119 S.Ct. at 1176. Similarly, Dr. Johnston's review of pleadings from cases supplied to him by plaintiffs' counsel is not the type of material on which safety engineers would ground an opinion concerning the hazards of a particular machine. While such material might supply general background information concerning the need for guards or interlocks, it cannot substitute for an in-depth review of the machine in question and identification of an alternative design that will not affect the utility of the machine or be cost-prohibitive. As stated by the court in *Cummins, supra*:

> "There are a number of considerations which must inform . . . a conclusion [an alternative design should have been incorporated into a machine]. These include, but are not limited to, the degree to which the alternative design is compatible with existing systems and circuits; the relative efficiency of the two designs; the short- and long-term maintenance costs associated with the alternative design; the ability of the purchaser to service and to maintain the alternative design; the relative cost of installing the two designs; and the effect, if any, that the alternative design would have on the price of the machine. Many of these considerations are product- and manufacturer-specific, and most cannot be deter-pined reliably without testing." *Cummins, supra*, 93 F.3d at 370.

Dr. Johnston's opinions regarding an emergency shut-down system and extension tools are similarly not-reliable. As respects his conclusion that the machine should have been equipped with a pull cord that would have enabled Gary Furry to turn off the power once his hand was caught in the printing roller, Dr. Johnston acknowledged that he had performed no testing of his concept. And, while Dr. Johnston cited as support for the proposal the fact that

another machine at Mead Products was equipped with pull cords, he could not say whether chose were original equipment or had been added by Mead. Nor did he know when the other machine had been manufactured.

The reliability of Dr. Johnston's opinion that "hickey pickers" should have been provided with the machine is suspect for the same reasons. He testified that he had seen only one "hickey picker," and had no opinion as to what the actual design of the tool should be. He also stated that he did not know whether "hickey pickers" were generally provided by the machine manufacturer or constructed on site by the company that purchased it.

Finally, Dr. Johnston's testimony regarding warnings is too generalized to satisfy Rule 702's requirement that expert testimony be reliable. He has not proffered suggested warring language, but states simply that Bielomatik should have advised prior purchasers ' of paper converting machines that interlocks were available and that they should be installed on existing machines. During his deposition, Dr. Johnston mentioned both warnings and instructions. When asked whether he had formed an opinion as to what should have been included in any package sent to machine owners, Dr. Johnston stated that his opinion was "not anything more specific than [that] directions and warnings related, to the dangers associated with operating th[e] machine without the guards on, with picking hickeys on the run, and the need to have interlocks on the guards" should

have been given.[58] Compare *Jaurequi, supra*, 1999 WL 185046 at * 7 (finding experts' testimony regarding warnings unreliable because they had created or tested specific warning language and were unable to point to other manufacturers who used similar warnings during the relevant tune period).

In short, after thoroughly examining the record, the court cannot say that Dr. Johnston has employed "the same level of intellectual rigor that characterizes [safety engineering] practice" in forming his opinions. Thus, it finds that all of the opinions Dr. Johnston proposes to proffer do not have sufficient indicia of reliability, and may not be admitted under Rule 702.

III. CONCLUSION

For the foregoing reasons, the court grants defendant's motion in limine to exclude the testimony of plaintiffs' expert witness, Dr. Waymon Johnston, without prejudice. Plaintiffs shall file a motion for reconsideration on or before May 24, 1999.

DATED: May 17, 1999.

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

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[58] Johnston Depo. at 268:6-12.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GARY FURRY and REGINE FURRY, Plaintiffs, vs. BIELOMATIK, INC., a corporation, aka BIELOMATIK LEUZE GMBH & CO., and MATIK NORTH AMERICA, Defendants.	CASE NO. CV 98-2600 MMM (ANx) ORDER REGARDING USE OF THE CONSUMER EXPECTATIONS AND/OR RISK-BENEFIT TESTS AND DIRECTING THAT DEFENDANT FILE A SUMMARY JUDGMENT MOTION BASED ON PLAINTIFFS' LACK OF AN EXPERT (FILED June 4, 1999)

On May 17, 1999, the court granted defendant's motion in limine to exclude plaintiffs' expert, Dr. Waymon Johnston, from testifying at the trial of this action. On May 24, 1999, plaintiffs filed a motion for reconsideration of

this ruling, which the court denied on June 2, 1999. Also on May 24, Bielomatik filed a motion to preclude plaintiffs from eliciting opinion testimony from any undesignated expert witness. In the body of this motion, and in its proposed order, Bielomatik asserts that "[because plaintiffs have no liability expert to establish the existence of a design defect, entry of judgment as a matter of law in favor of defendant is appropriate."[1] In their opposition, plaintiffs did not address this issue; rather, they focused on the motion's request that undesignated experts be precluded from testifying.

Bielomatik filed a separate motion on May 24, seeking to preclude the introduction of evidence or argument concerning the consumer expectations test for proving design defects. In their opposition to this motion, plaintiffs contend, *inter alia*, that where a party bases an allegation of design defect on the consumer expectations test, expert testimony is not admissible.[2] As will be discussed infra, the court does not agree completely with this statement. Whether the consumer expectations test or the alternative risk-benefit test is properly utilized in this case, however, is relevant in assessing whether plaintiffs can prove a prima facie case of

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[1] Motion in Limine to Preclude Opinion Testimony of Undesignated Expert Witnesses at 8:12-15.

[2] Plaintiffs' Opposition to Defendant's Motion to Preclude Application of the Consumer Expectations Test at Trial ("Pls.' Opp.") at 3:1-2.

strict liability or negligence without an engineering expert, and thus whether Bielomatik's request for judgment as a matter of law has merit.

In order that these matters may be thoroughly and properly briefed, the court directs that Bielomatik file a motion for summary judgment on or before June 21, 1999, addressing whether plaintiffs can prove a prima facie case of either strict liability or negligence without the testimony of Dr. Johnston. Proceeding in such a fashion will ensure that plaintiffs have a full opportunity to address whether expert testimony is necessary, as well as an opportunity to present the evidence that they believe allows decision of the case by the jury. See *Ortega v. O'Connor*, 146 F.3d 1149, 1160 and n. 15 (9th Cir. 1998) (affirming trial court's pretrial order granting of a "motion in limine" that the Ninth Circuit deemed "effectively . . . partial summary judgment" because the parties had had an adequate opportunity to address the issues involved).

As respects use of the consumer expectations and/or risk-benefit tests, the court concludes that it is premature to select one of these tests as the proper theory upon which to instruct the jury or decide the case. Consequently, the parties' briefs respecting the motion for summary judgment should address both theories.

I. DISCUSSION

A. Products Liability: Consumer Expectations/Risk-Benefits Tests.

In this diversity case, the court applies the substantive law of the forum state, California. *Cleary v. News Corp.*, 30 F.3d 1255, 1265 (9th Mr. 1994). The California Supreme Court has held that a manufacturer, distributor or retailer may be held strictly liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable manner. *Soule v. General Moors Corp.*, 8 Cal.4th 548, 560 (1994); *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 62-63 (1963).

In *Barker v. Lull Engineering Co.*, 20 Cal3d 413, 429 (1978), the Court articulated two alternatives tests for determining whether a product is defective in design: a design defect can be proved if either (1) "the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner," or (2) "the risk of danger inherent in the challenged design outweighs the benefits of such design." See also *Soule*, *supra*, 8 Cal.4th at 566 ("In Barker, we offered two alternative ways to prove a design defect, each appropriate to its own circumstances"). 'these two methods of proving design defect have come to be known, respectively, as the consumer expectations and risk-benefit tests. In *Soule*, the Supreme Court attempted to provide guidance as to when use of one or the other of the tests is appropriate.

1. Consumer Expectations Test

Soule instructed that "the consumer expectations test [should be] reserved for cases in which the everyday

experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions, and is thus defective regardless of expert opinion about the merits of the design." *Soule, supra*, 8 Cal.4th at 567. It noted, however, that "appropriate use of the consumer expectations test is not necessarily foreclosed simply because the product at issue is only in specialized use, so that the general public may not be familiar with i its safety characteristics." *Id.* at 568, n. 4. Rather, J[i]f the safe performance of the product fell below the reasonable, widely shared minimum expectations of those who do use it, perhaps the injured consumer should not be forced to rely solely on a technical comparison of risks and benefits." *Id.* Ultimately, "[unless the facts actually permit an inference that the product's performance did not meet the minimum safety expectations of its ordinary users, the jury roust engage in the balancing of risks and benefits required by the second prong of Barker." *Id.* at 568.

Where the consumer expectations test is appropriately invoked, and "[where the minimum safety of a product is within the common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect [since use of expert testimony for that purpose would invade the jury's function . . . ." *Id.* at 567. Where, however, "the expectations of the product's limited group of ordinary consumers are beyond the lay experience common to all jurors, expert testimony on the limited subject of what the

product's actual consumers do expect may be proper." *Id.* at 568, n. 4.

In the present case, plaintiffs argue that "every juror's everyday experience would indicate that the printing section of the P-581 machine involved printing rollers turning at very high. speeds and that it was reasonably foreseeable that a person's fingers could be caught in such rollers."[3] Thus, they assert, the average consumer would expect that the machine would be equipped with an emergency shut-off switch."[4] Similarly, plaintiffs contend that an ordinary consumer would expect that warnings and/or instructions would be given concerning any known method of shutting the machine down in an emergency.[5]

Based on the guidance provided by *Soule*, the court questions whether ordinary consumers, and thus ordinary jurors, would have wry expectations concerning the machine in question. The machine is in specialized and limited use.[6] Thus, there is only a limited group of "consumers" whose expectations would be relevant. Consequently, to the extent

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[3] Pls.' Opp. at 3:14-16.

[4] *Id.* at 3:17-19.

[5] *Id.* at 5:24-28.

[6] See First Amended Complaint, ¶ 10; Bielomatik's Responses to First Set of Interrogatories, Response No. 14, 15 (42 P-581 machines were produced between 1975 and 1995, and 14 were sold new in the United States).

the consumer expectations test is properly invoked in this case, it would appear that expert testimony would be necessary to establish what the safety expectations of machine users are. See, e.g., *Lunghi v. Clark Equipment Co.*, 153 Cal.App.3d 485, 496 (1984') ("This does not seem to be the kind of question that twelve ordinary people drawn from the community at large could evaluate based on their own 'common knowledge.' . . . Frankly, we think that an ordinary consumer would not know what to expect from a piece of heavy machinery like the Bobcat loader, even if the engine vas turned off. . . . On remand, appellants are free to present evidence in the form of expert opinions on the reasonable expectations of consumers of the product involved here, which is outside the experience of ordinary consumers"); *Rosburg v. Minnesota Mining & MFG. Co.*, 181 Cal.App.3d 726, 731 (1986) (although mammary implants are not "commonly available products," the consumer expectations test was properly used because a physician testified concerning the "ordinary expectations of product performance" among physicians who purchased and prescribed the product). See also *Morton v. Owens Corning Fiberglas Corp.*, 33 Cal.App.4th 1529, 1536 (1995) ("Under certain circumstances, expert testimony may be admissible to prove what ordinary consumers of the product actually expect when those expectations are beyond the lay experience common to all jurors").

The court does not at this stage decide either whether the consumer expectations test is properly invoked in this

case, or whether expert testimony is necessary to establish what the safety expectations of ordinary users of the paper converting machine are. These issues are more properly resolved in the context of the summary judgment motion defendant has been directed to bring, and the court offers these preliminary observations to assist the parties in preparing their motion papers on the pint.

2. Risk-Benefit Test

As the *Barker* court noted, "the expectations of the ordinary consumer cannot be viewed as the exclusive yardstick of evaluating design defectiveness because '[i]n many situations . . . the consumer would not know what to expect, because he would have no idea how safe the product could be made.'" *Barker*, *supra*, 20 Cal.3d at 430. Consequently, the Supreme Court held that "a product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies 'excessive preventable danger,' or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design." *Id.*

The *Soule* court expanded upon these statements in *Barker*, noting that "a complex product, even when it is being used as intended, may often cause injury in a way that does not engage its ordinary consumers' reasonable minimum assumptions about safe performance." *Soule*, *supra*, 8 Cal.4th at 566-67. Where this is the case, evidence must be presented concerning such "technical issues as

feasibility, cost, practicality, risk and benefit," and the jury must evaluate "the manufacturer's evidence of competing design considerations." *Id.*

Where the risk-benefit test is property used, "juries receive expert advice, apply clear guidelines, and decide accordingly whether the product's design is an acceptable compromise of competing considerations." *Id.* at 567, n. 4 (emphasis added). See also *Lunghi, supra,* 153 Cal.App.3d at 490 ("In this sort of [risk-benefit] analysis, the jury necessarily relies heavily on the testimony of experts"); *Rosburg, supra,* 181 Cal.App.3d at 733, n. 4 (discussing *Lunghi* and *Bates v. John Deere Co.*, 148 Cal.App.3d 40 (1983), which involved a commercial cotton-picker, and noting that "[e]xpert testimony was required in those cases because the ordinary juror would not know how these pieces of equipment would be expected to perform under the circumstances"). Cf. *DeLeon v. Commercial Manufacturing & Supply Co.*, 148 Cal.App.3d 336, 348 (1983) ("It is reversible error to refuse expert testimony concerning the necessity and feasibility of certain design changes to enhance the safe operation of machinery").

As can be seen, to the extent the risk-benefit test is that properly used in evaluating plaintiffs' claim of design defect, it appears that expert testimony will be necessary.

3. Negligence

A key element of any negligence claim is establishing the standard of care to which a reasonable individual in the defendant's position would lave adhered.

Where the allegedly negligent act involves product design or manufacture, expert testimony is generally necessary to establish the standard. See *Miller v. Los Angeles County Flood Control District*, 8 Cal.3d 689, 702-03 (1973) (noting, in the context of a negligence claim against a home builder, that "[i]f the matter in issue is one within the knowledge of experts only and not within the common knowledge of laymen, it is necessary for the plaintiff to introduce expert opinion evidence in order to establish a prima facie case," and holding that "[t]he average layman has neither, training nor experience in the construction industry and ordinarily cannot determine whether a particular building has been built with the requisite skill and in accordance with the standards prescribed by law or prevailing in the industry"). See also *Bogosian v. Mercedes-Benz of North America, Inc.*, 104 F.3d 472, 475 (1st Cir. 1997) (upholding trial court's grant of summary judgment where plaintiff failed to establish the standard of care governing the installation of park ignition interlock mechanisms by automobile distributors); *Hull v. Eaton Corp.*, 825 F .2d 448, 455 (D.C. Cir. 1987) (affirming summary judgment for the manufacturer of a forklift on, *inter alia*, a negligence claim because plaintiffs failed to produce expert testimony as to whether a reasonable manufacturer would have selected a safer design). Thus, with respect to plaintiffs' alternative theory as well, it appears that expert testimony may be necessary.

II. CONCLUSION

In light of the court's exclusion of Dr. Johnston's testimony, it appears that plaintiffs may be unable to prove a prima facie case of strict liability or negligence. In order to ensure that all parties have a full opportunity to brief this issue, the court denies Bielomatik's motion for judgment as a matter of law, and directs it to file a motion for summary judgment addressing the question on or before June 21, 1999. Plaintiffs are directed to file opposition to the motion on or before July 6, 1999, and Bielomatik may file a reply on or before July 12, 1999. The court sets a hearing on the motion for July 19, 1999 at 10:00 a. m. In light of this order, the trial date of June 15, 1999 is vacated. Similarly, the hearing on the parties' remaining motions in Limine set for June 7, 1999 at 10:00 a.m. is vacated.

DATED: June 3, 1999.

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GARY FURRY and REGINE FURRY, Plaintiffs, vs. BIELOMATIK, INC., a corporation, et al., Defendants.	)	CASE NO. CV 98-2600 MMM (ANx) ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF COURT'S ORDER EXCLUDING EXPERT TESTIMONY OF DR. WAYMON JOHNSTON (FILED June 4, 1999)

On May 17, 1999, the court granted defendant's motion in limine to exclude plaintiffs' expert; Dr. Waymon Johnston, from testifying at trial in this action. It found that Dr. Johnston had not used the "same level of intellectual rigor" that safety engineers typically employ in forming his opinions regarding liability in this case. Specifically, the court noted that Dr. Johnston declined to propose an

alternative design for the Bielomatik paper converting machine alleged to have caused Gary Furry's injuries, and that he could not state how the interlocks he proposed would affect the utility of the machine. Dr. Johnston also opined that the machine should have been equipped with an emergency shut-down device. He described his concept of the device as "a pull cord all the way across the entire front of the roller," but did not opine, and was not asked, whether such a device was feasible, and how it would have affected the utility of the machine. Dr. Johnston also testified that an extension tool known as a "hickey picker" should have been available to employees such as Furry. He could not state, however, whether such tools are generally provided by the manufacturer of the machine or by the company that purchases it. Nor could he identify any particular design of tool that he would recommend, or specify the materials that should be used to construct it. Dr. Johnston's final opinion was that Bielomatik should have provided instructions or warnings regarding the need to interlock the guards over the printing rollers, and that it should have advised purchasers when an interlock system later became available. He proffered no specific warning language, however, and stated that his opinion was nothing more specific than that warnings and instructions should have been given.

The court additionally found that the foundation upon which Dr. Johnston based his opinions was weak. It noted that Dr. Johnston could not state whether he had ever examined a machine that performed functions similar to

those of the Bielomatik paper converting machine at issue in this litigation, and that he had testified in only one case involving an. arguably similar piece of equipment. Furthermore, Dr. Johnston examined the machine in question for only an hour and twenty minutes, and based his opinions in part on types of information not typically used by safety engineers, i.e., reported court cases collected and provided to him by plaintiffs' counsel.

Consequently, the court found that Dr. Jobnston's testimony was not sufficiently reliable to be admissible under Federal Rule of Evidence 702, and, exercising its gatekeeper function under *Daubert v. Merrell Downey Record Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 119 S.Ct. 1167 (1999), excluded it. Plaintiffs contended that the court's ruling was overbroad, and that it would be highly prejudicial to their case. Appreciating the ruling's impact on plaintiffs' ability to prove a prima facie case, the court invited a motion for reconsideration, and urged plaintiffs to bring to the court's attention any specific arguments regarding overbreadth they might have.

Plaintiffs filed their motion for reconsideration on May 24, 1999. In it, they contend that the exclusion of all aspects of Dr. Johnston's testimony is overbroad, but do not address the specific opinions he has rendered in any particularized fashion. Nor do they proffer any argument as to why Dr. Johnston's opinions are reliable. Rather, they submit certain of Bielomatik's interrogatory answers and

responses to requests for admission that they argue provide additional foundation for Dr. Johnston's opinions herein. These discovery responses were served after Dr. Johnston prepared his expert report on December 31, 1998, and plaintiffs assert, in essence, that they constitute newly discovered evidence supporting the request for reconsideration.

The discovery responses establish that Bielomatik had the technology to interlock the guards over the printing rollers available at the time it built the paper converting machine in 1984,[7] and that it interlocked other parts of the machine, such as the knife cylinder area and the bridging to the cross cutter.[8] They also demonstrate that sometime between 1975 and 1995, Bielomatik began to sell paper converting machines in Europe that were equipped with interlocked safety guards over the printing rollers.[9] Other responses indicate: (1) that Bielomatik interlocked certain areas of the machine and not others because German

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[7] Plaintiffs' Motion For Reconsideration of Court's Order Excluding Expert Testimony of Dr. Johnston ("Pls.' Mot.") at 4:13-16, Ex. B.

[8] *Id.*, Ex. B.

[9] *Id.* at 7:4-9, Ex. C. Precisely when such sales began is a subject of dispute. Bielomatik contends it did not sell interlocked machines before 1990, while plaintiffs assert such sales began earlier.

regulations required it to do so;[10] (2) that Bielomatik made no attempt to retrofit any of the machines sold in the United States once it had interlocks available for the guards over the printing rollers;[11] and (3) that, while Wilhelm Loewer, a Bielomatik service engineer, discovered the machine could be stopped by breaking the paper web running through it, Bielomatik never communicated this information to any machine purchasers by means of written operating instructions or warnings.[12]

Plaintiffs also cite the deposition testimony of defendant's expert, G.V. Karosas, concerning the number of times the printing rollers would have passed over Gary Furry's hand had the machine been equipped with an emergency shut-down device. Finally, they assert that they have not yet taken the deposition of Bielomatik's chief engineer, Hans Albrecht, whom the parties have agreed will be deposed immediately prior to trial. Mr. Albrecht's deposition, plaintiffs contend, will yield additional information supporting Dr. Johnston's opinions.

All of the evidence plaintiffs cite is potentially useful at trial to establish elements of their strict liability and negligence claims. It does not cure; however, the

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[10] *Id.* at 5:21-24, 5:26-6:4, Ex. C.

[11] *Id.* at 6:22-26, Ex. C.

[12] *Id.* at 8:1-9, 8:12-15, Ex. D.

deficiencies in Dr. Johnston's opinions or the bases upon which they rest. At his deposition, for example, Dr. Johnston said he assumed Bielomatik had the technological know-how to interlock the guards over the printing rollers in 1984. His report mentioned the fact that the company began to sell interlocked machines in Europe at a time when it did not offer them in the United States. Presumably, since he examined it prior to being deposed, Dr. Johnston was also aware that there were areas on the paper converting machine that were interlocked. Certainly, he knew no retrofit advisories had been disseminated; this was one of the specific grounds upon which he opined Bielomatik should be held liable.

Indeed, as Bielomatik points out, the discovery responses on which plaintiffs rely were served on January 22, 1999, more than six weeks *before* Dr. Johnston's deposition in this case. Thus, the information was available to him at that time, and was presumably utilized as the basis for certain of the opinions he rendered.

As respects Mr. Karosas' opinion regarding the impact of an emergency shut-down device, Dr. Johnston may certainly consider this testimony in formulating his opinions regarding the case. Even assuming that Dr. Johnston were to rely on Karosas' opinion, however, it would not make his own testimony regarding the design of such a device any more specific or reliable. Finally, while Dr. Johnston is also entitled to rely on and consider information garnered during the deposition of Mr. Albrecht, it is entirely speculative

whether such information will render his opinions more reliable. An expert adhering to the "level of intellectual rigor" normally practiced in his field would not wait for the completion of a deposition days before trial to construct a solid foundation for the onions he intends to offer. Rather, he would have formulated his opinions, articulated concrete bases far them, and used the information obtained at the opposing party's deposition simply to supplement the data already in his possession.

None of the information plaintiffs cite in their motion for reconsideration will assist Dr. Johnston in conceptualizing an alternative design for the paper converting machine, or in determining the utility of any such design. Similarly, the discovery to which they allude will not permit Dr. Johnston to address the feasibility of the emergency shut-down device he recommends, to craft specific warning language, or to support his opinion regarding the use of extension tools. Plaintiffs, in short, have failed to demonstrate that the court's earlier ruling was erroneous in whole or in part, and their motion for reconsideration must be denied.

1. DISCUSSION

A. Standard Governing Motions For Reconsideration

Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, the court may relieve a parry from a judgment or order for any of the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly

discovered evidence; (3) fraud, misrepresentation, or other misconduct; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) any other reason justifying relief from operation of the judgment. See Fed.R.Civ.P. 60(b).

In addition to Rule 60(b), the court is empowered to reconsider its decisions on motions pursuant to Local Rule 7.16. This rule provides:

> "A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise or reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion." Local Rule 7.16.

Applying either Rule 60(b) or Local Rule 7.16, the court must consider whether plaintiffs have presented new evidence or identified material facts that the court's prior order overlooked. Indeed, the court specifically invited plaintiffs to present such information and argument at the time it initially ruled on the motion its limine to exclude Dr. Johnston's testimony.

B. The "New" Evidence

Plaintiffs' motion is based primarily on discovery responses served in January 22, 1,999. While Dr. Johnston produced his report on December 31, 1998, he was not deposed until March 10, 1999. Thus, well before he was deposed, Dr. Johnston had access to Bielomatik's admissions that it had the technology available to interlock the guards in 1984; that it sold interlocked machines in countries other than the United States; that it relied on German regulations in deciding which areas of the machine to interlock; that it failed to undertake any effort to retrofit machines sold in the United States without interlocks; and that it failed to advise purchasers that the machine could be stopped by breaking the web of paper running through it. Nonetheless, the opinions he offered during the deposition, and the stated bases for those opinions were not sufficiently-specific or reliable to be of assistance to the trier of fact in this case.

Moreover, given the evident sequence of events, the admissions are not "new evidence" that will support a motion for reconsideration of the court's prior ruling. Similarly, Mr. Loewer was deposed on December 18, 1998,

both before Dr. Johnston issued his report and before he was deposed. Thus, his testimony too is not "new evidence" upon which reconsideration can be based.

C. Failure To Consider Material Facts

At the hearing on defendant's motion in limine, plaintiffs' counsel argued that any ruling totally excluding Dr. Johnston's testimony was overbroad. The court invited counsel to highlight areas in which the opinions he had proffered were sufficiently reliable that they could be admitted. In their motion for reconsideration, plaintiffs have once again asserted that the ruling : is overbroad, but they have failed to identify any particular area in which Dr. Johnston's opinion are adequate to satisfy *Daubert*, *supra*, and *Kumho*, *supra*. Dr. Johnston did not submit a declaration addressing in greater detail, for example, the basis for his opinion that an emergency shut-down device in the form of a pull cord across the front of the roller should have been incorporated into the machine. He did not discuss the feasibility of such a design or otherwise attempt to bolster the opinion he had rendered regarding it. Similarly, Dr. Johnston provided no additional information concerning the warnings he believed should have been attached to the machine when it was sold or the basis for his opinion that a retrofit advisory was warranted or required under the industry standard of care. Compare *McKendall v. Crown Control Corp.*, 122 F.3d 803, 805 (9th Cir. 1997) (in support of a motion for reconsideration of an order excluding his expert's testimony, plaintiff submitted the expert's

declaration, explaining his qualifications and providing additional detail regarding his opinions).

Since the ruling on the motion to exclude Dr. Johnston's testimony, defendant has filed another motion in limine that seeks to exclude any evidence or argument regarding the expectations of individuals who routinely use the paper converting machine. The court has not yet ruled on this motion, and believes it cannot do so without knowing what evidence will be presented in the case. It notes, however, that to the extent plaintiffs seek to rely on the consumer expectations test, Dr. Johnston has presented no evidence or opinions regarding the commonly held expectations of individuals who work with and use Bielomatik's machine or equipment similar to it.

The information plaintiffs have proffered in support of their motion for reconsideration does not demonstrate that the prior ruling was overbroad or erroneous, and plaintiffs' failure to demonstrate that the court overlooked material facts requires its denial.

II. CONCLUSION

For the foregoing reasons, the court denies plaintiffs' motion for reconsideration of its order excluding the expert testimony of Dr. Waymon Johnston.

DATED: June 2, 1999

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GARY FURRY and REGINE FURRY, Plaintiffs, vs. BIELOMATIK, INC., a corporation, aka BIELOMATIK LEUZE GMBH & CO., and MATIK NORTH AMERICA, Defendants.	CASE NO. CV 98-2600 MMM (Anx) ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (FILED January 26, 2001) (ENTERED January 29, 2001)

In May 1995, plaintiff Gary Furry sustained in an injury to his right hand while operating a paper converting machine. Plaintiffs allege that defendant Bielomatik Leuze GMBH & Co. defectively designed the machine by failing to include an "interlocked protection guard" over the printing rollers and by failing to equip the machine with an emergency shut-off device. They further allege that Bielomatik failed to instruct users that the machine could be stopped by breaking the web of paper running through it.

Finally, plaintiffs allege that the machine was defectively manufactured because other models of the paper converter were equipped with interlocked guards.

On May 17, 1999 the court granted defendant's motion in limine to exclude the testimony of plaintiffs' expert, Dr. Waymon Johnston, at trial. On May 24, 1999, plaintiffs filed a motion for reconsideration of this ruling, which the court denied on June 2, 1999. Also on May 24, Bielomatik filed a motion to preclude plaintiffs from eliciting opinion testimony from any undesignated expert witness. In the body of the motion, and in its proposed order, Bielomatik asserted that judgment should be entered in their favor "[b]ecause plaintiffs have no liability-expert to establish the existence of a design defect."[1] In a separate motion, Bielomatik sought to preclude use of the consumer expectations test to prove that the paper converting machine was defectively designed.

The court determined that it was premature to preclude use of the consumer expectations test. It noted, however, that it was questionable whether plaintiffs could prove a prima facie case of products liability or negligence without an engineering expert. To give plaintiffs sufficient opportunity to brief the issue, the court declined Bielomatik's request to enter judgment as a matter of law,

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[1] Motion in Limine to Preclude Opinion Testimony of Undesignated Expert Witnesses at 8:12-15.

and directed that it file the instant motion for summary judgment.

Bielomatik's motion asserts that the consumer expectations test is not properly utilized in this case because the manner in which the Bielomatik machine operates is not within jurors' common knowledge or experience. Additionally, it contends that plaintiffs cannot prove that the design of the paper converting machine proximately caused Furry's injuries without resort to expert testimony. Plaintiffs counter that testimony concerning the manner in which the injury to Gary Furry's hand occurred is sufficient to establish proximate causation and shift the burden to Bielomatik to prove the adequacy of the machine's design under a risk/benefit standard.

As respects the fact that the machine lacked attached, interlocked safety guards over the printing rollers, plaintiffs assert that the design violated federal OSHA standards, and that this violation is evidence of defective design as well as negligence per se.[2] As respects the absence of an emergency shut-off switch, plaintiffs argue that proximate cause is established by the combined testimony of Bielomatik's expert, George Karosas, and Gary Furry's doctor, Mark

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[2] Plaintiffs argue that Bielomatik admits it possessed the technology necessary to interlock the safety guards at the time it sold the paper converting machine to Furry's employer. Assuming *arguendo* that such an admission has been made, this does not prove that Gary Furry's injuries were caused by defective design of the machine.

Mandel. Karosas testified that, had the machine been equipped with an emergency shut-off switch, the rollers would have rotated twenty-six times after the switch was activated, while Mandel opined that Furry's injuries would have been substantially less severe had the rollers passed over his hand only twenty-six times. Finally, as respects Bielomatik's alleged failure to instruct that the machine could be turned off by breaking the web of paper, plaintiffs contend that proximate cause is established by evidence that the machine shuts down within thirty seconds after the web of paper running through it is broken, and by evidence that only Furry's middle and index fingers would have been injured had the machine been stopped thirty seconds after his hand became engaged.

In support of their manufacturing defect claim, plaintiffs cite evidence that the machine was offered for sale in Europe with interlocked guards, and contend this establishes that the unit that injured Gary Furry was different than other units of the same product line. Additionally, plaintiffs contend that Bielomatik's failure to conduct a retrofit campaign after learning that another worker had suffered injury is evidence of negligence under *Hernandez v. Badger Construction Co.*, 28 Cal.App.4th 1791 (1994). These arguments will be addressed *seriatim* below.

I. DISCUSSION

A. Legal Standard Governing Summary Judgment

A motion for summary judgment must be granted when "the pleadings, depositions. answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and of identifying those portions of the pleadings and discovery responses which demonstrate the absence of a genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof on an issue at trial, the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. However, on an issue as to which the nonmoving party will have the burden of proof at trial, the movant can prevail merely by pointing out that there is an absence of evidence to support the nonmoving party's case. See *Id.* If the moving party meets its initial burden, the nonmoving party must then set forth, by affidavit or as otherwise provided in Rule 56, "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); Fed.R.Civ.P. 56(e).

In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. Rather, it draws all inferences in the light most favorable to the nonmoving party. See *T.W. Electric Service, Inc. v. Pacific Electric Contractors Ass'n*,

809 F.2d 626, 630-31 (9th Cir.1987). The evidence presented by the parties must be admissible. Fed.R.Civ.P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. See *Falls Riverway Realty, Inc v. Niagara Falls*, 754 F.2d 49, 56 (2d Cir.1985); *Thornhill Pub. Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir.1979).

B. Products Liability: Three Alternative Tests

Because this is a diversity case, the court applies the substantive law of the forum state, California. *Cleary v. News Corp.*, 30 F.3d 1255, 1265 (9th Cir. 1994). The California Supreme Court has held that a manufacturer, distributor or retailer may be held strictly liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable manner. *Soule v. General Motors Corp.*, 8 Cal.4th 548, 560 (1994); *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 62-63 (1963). Liability may also be imposed where the absence of or an inadequate warning creates unreasonable risk for a consumer using the product. *Anderson v. Owens-Corning Fiberglas Corp.* 53 Cal.3d 987, 995-96 (1991) ("a product, although faultlessly made, may nevertheless be deemed 'defective' under the rule and subject the supplier [or manufacturer] thereof to strict liability if it is unreasonably dangerous to place the product in the hands of a user without a suitable warning and the product is supplied

and no warning is given" (quoting *Canifax v. Hercules Powder Co.*, 237 Cal.App.2d 44, 52-53 (1965)).

There are two distinct tests for determining whether a product has been defectively designed. In *Barker v. Lull Engineering Co.*, 20 Cal.3d 413, 429 (1978), the California Supreme Court held that a design defect can be proved if either (1) "the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner," or (2) "the risk of danger inherent in the challenged design outweighs the benefits of such design." See also *Soule, supra*, 8 Cal.4th at 566 ("In *Barker*, we offered two alternative ways to prove a design defect, each appropriate to its own circumstances"). These two methods of proving design defect have come to be known, respectively, as the consumer expectations and risk-benefit tests.

1. Consumer Expectations Test

Soule instructs that "the consumer expectations test [should be] reserved for cases in which the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions, and is thus defective regardless of expert opinion about the merits of the design." *Soule, supra*, 8 Cal.4th at 567. The Supreme Court there noted, however, that "appropriate use of the consumer expectations test is not necessarily foreclosed simply because the product at issue is only in specialized use, so that the general public may not be familiar with its safety characteristics." *Id.* at 568, n. 4.

Rather, "[i]f the safe performance of the product fell below the reasonable, widely shared minimum expectations of those who do use it, perhaps the injured consumer should not be forced to rely solely on a technical comparison of risks and benefits." *Id.* Ultimately, "[u]nless the facts actually permit an inference that the product's performance did not meet the minimum safety expectations of its ordinary users, the jury must engage in the balancing of risks and benefits required by the second prong of *Barker*." *Id.* at 568.

Where the consumer expectations test is properly applied, and "[w]here the minimum safety of a product is within the common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect [since a]se of expert testimony for that purpose would invade the jury's function . . . ." *Id.* at 567. Where, however; "the expectations of the product's limited group of ordinary consumers are b6yond the lay experience common to all jurors, expert testimony on the limited subject of what the product's actual consumers do expect may be proper." *Id.* at 568, n. 4.

Plaintiffs opposed Bielomatik's earlier motion in limine to preclude evidence and argument regarding the consumer's expectations test on the basis that "every juror's everyday experience would indicate that the printing section of the P-581 machine involved printing rollers turning at very high speeds and that it was reasonably foreseeable that

a person's fingers could-be caught in such rollers."[3] In its order addressing the motion, the court noted that, under *Soule*, it was questionable whether ordinary consumers, and thus ordinary jurors, would have any expectations concerning the machine in question. In this regard, the court cited the fact that the machine is in specialized and limited use,[4] and thus that the relevant group of "consumers" is quite small. It therefore opined that, to the extent the consumer expectations test was properly invoked in this case, expert testimony would probably be necessary to establish what the safety expectations of machine users were. See, e.g., *Lunghi v. Clark Equipment Co.*, 153 Cal.App.3d 485, 496 (1984) ("This does not seem to be the kind of question that twelve ordinary people drawn from the community at large could evaluate based on their own 'common knowledge.'. . . Frankly, we think that an ordinary consumer would not know what to expect from a piece of heavy machinery like the Bobcat loader, even if the engine was turned off. . . . On remand, appellants are free to present evidence in the form of expert opinions on the reasonable expectations of consumers of the product involved here, which is outside the experience

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[3] Plaintiffs' Opposition to Defendant's Motion to Preclude Application of the Consumer Expectations Test at Trial at 3:14-16.

[4] See First Amended Complaint, 1 10; Bielomatik's Responses to First Set of Interrogatories, Response No. 14, 15 (42 P-581 machines were produced between 1975 and 1995; and 14 were sold new in the United States).

of ordinary consumers"); *Rosburg v. Minnesota Mining & Mfg. Co.*, 181 Cai.App.3d 726, 731 (1986) (although mammary implants are not "commonly available products," the consumer expectations test was properly used because a physician testified concerning the "ordinary expectations of product performance" among physicians who purchased and prescribed the product). See also *Morton v. Owens Corning Fiberglas Corp.*, 33 Ca1.App.4th 1529, 1536 (1995) ("Under certain circumstances, expert testimony may be admissible to prove what ordinary consumers of the product actually expect when those expectations are beyond the lay experience common to all jurors").

In their opposition to Bielomatik's motion for summary judgment, plaintiff do not argue that the consumer expectations test should apply in this case, or that they can prove a prima facie case of strict liability under it. Rather, they focus exclusively on the adequacy of their proof under the alternative risk/benefit test. This approach is consistent with the two proposed pretrial conference orders the parties have submitted to date. In each, plaintiffs state that Gary Furry "will seek damages on the . . . theor[y] . . . [t]hat plaintiff's injuries were caused by a defect in design of the P-51 machine, *and [that he] will pursue recovery based on the 'risk-benefit' definition.*"[5] The combined effect of these

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[5] Proposed Pre-Trial Conference Order filed May 12, 1999 at 9:5-9; Proposed Amended Pre-Trial Conference Order filed May 24, 1999 at 14:12-16.

various pleadings is the abandonment by plaintiffs of any reliance on the consumer expectations test to prove a design defect in this case. Accordingly, the court will review the merits of Bielomatik's summary judgment motion by applying the risk/benefit test.

2. Risk/Benefit Test

As the *Barker* court noted, "the expectations of the ordinary consumer cannot be viewed as the exclusive yardstick [for] evaluating design defectiveness because '[i]n many situations . . . the consumer would not know what to expect, because he would have no idea how safe the product could be made.'" *Barker*, *supra*, 20 Cal.3d at 430. Consequently, "a product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies 'excessive preventable danger,' or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design." *Id.*

The California Supreme Court has clearly allocated the respective burdens of the parties in a case where plaintiff seeks to prove design defect using the risk/benefit test:

> "The policies underlying the doctrine of strict products liability mandate shifting the burden of proof under the [risk/benefit] test .... Because most of the evidentiary, matters which may be relevant to the determination of the

adequacy of a product's design under the 'risk-benefit' standard – e.g., the feasibility and cost of alternative designs – are similar to issues typically presented in a negligent design case and involve technical matters peculiarly within the knowledge of the manufacturer, we conclude that once the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective. Moreover, inasmuch as this conclusion flows from our determination that the fundamental public policies embraced in *Greenman* dictate that a manufacturer who seeks to escape liability for an injury proximately caused by its product's design on a risk-benefit theory should bear the burden of persuading the trier of fact that its product should not be judged defective, the defendant's burden is one affecting the burden of proof, rather than simply the burden of producing evidence." *Campbell v. General Motors Corp.*, 32

Cal.3d 112, 119 (1982) (quoting *Barker*, *supra*, 20 Cal.3d at 431-32).

See also *Soule, supra*, 8 Cal.4th at 571, n. 8; *Bresnahan v. Chrysler Corp.*, 32 Cal.App.4th 1559, 1565 (1995); *Lunghi, supra*, 153 Cal.App.3d at 497-98.

Thus, in order to establish a prima facie case of defective design, plaintiffs must prove that "a design feature of the product was a proximate cause of [Gary Furry's] injury." *Campbell, supra*, 32 Cal.3d at 119. At that point, the burden shifts to Bielomatik to prove that the benefits of the design outweigh any risk of danger inherent in it. *Id.* See also *Barker, supra*, 20 Cal.3d at 426-27 ("a product is defective in design if . . . plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove that on balance the benefits of the challenged design outweighed the risk of danger inherent in such design").

Plaintiffs here posit two design defects that caused Gary Furry's injuries: the fact that the safety guards over the printing rollers were not permanently affixed and interlocked, and the fact that the machine was not equipped with an emergency shut-off device. Each contention must be considered separately for purposes of determining whether plaintiffs have adduced sufficient evidence of causation to defeat summary judgment.

a. Failure To Interlock And Permanently Attach Safety Guards Over The Printing Rollers

1. Causation

In their opposition, plaintiffs adduce no specific evidence tending to prove that the failure to interlock and permanently attach safety guards over the printing rollers proximately caused Gary Furry's injury. Rather, they rely on the fact that Bielomatik purportedly had the technology available to interlock the safety guards at the time it manufactured and sold the machine purchased by Furry's employer, Mead Products.[6] Plaintiffs support their argument with cases holding that a manufacturer that fails to equip a product with available safety devices may be held strictly liable in tort. See, e.g., *Pike v. Frank G. Hough Corp.*, 2 Cal.3d 465, 472 (1970); *Balido v. Improved Machinery, Inc.*, 29 Cal.App.3d 633, 640 (1973); *Garcia v. Halsett*, 3 Cal.App.3d 319, 323, 326 (1970).

These decisions do not address proof of causation. Rather, they discuss what constitutes a design defect for purposes of strict liability in tort. See *Pike*, *supra*, 2 Cal.3d at 475-77 (a product "may be defective if it lacks safety devices necessary to its reasonable safety"); *Balido*, *supra*, 29 Cal.App.3d at 640 ("the manufacturer's ability, actual, constructive, or potential, to forestall unreasonable danger is the measure of its duty in the design of its product. A manufacturer's failure to achieve its full potential in design and thereby forestall unreasonable danger forms the basis for

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[6] See Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("Pl.'s Opp.") at 12:17-22.

its strict liability in tort"); *Garcia, supra*, 3 Cal.App.3d at 422-23 (holding that the trial court should have given a strict liability instruction because the evidence was sufficient to sustain a finding that a washing machine that lacked a readily available, inexpensive micro switch was defectively designed).

As with any other tort, causation is a prerequisite to the imposition of strict liability for defective product design. See *Soule, supra*, 8 Cal.4th at 572 ("A manufacturer is liable only when a defect in its product was a legal cause of injury"); *Cronin v. J.B.E. Olson Corp.*, 8 Cal.3d 121, 133-34 (1972) (same). Indeed, as *Campbell* makes clear, it is the sole element plaintiffs must prove to establish a prima facie case, and shift the burden of proof to Bielomatik. *Campbell, supra*, 32 Cal.3d at 119.

Plaintiffs can meet their burden of proving causation if they show that the design of the paper converting machine was a substantial factor causing Gary Furry's injury. See *Soule, supra*, 8 Cal.4th at 572. See also *West v. Johnson & Johnson*, 174 Cal.App.3d 831, 859 (1986) (holding that causation was adequately proved because "there was substantial credible evidence to the effect that the use of tampons is a substantial factor in the occurrence of menstrually-associated TSS"). Cf. *Lineaweaver v. Plant Insulation Co.*, 31 Cal.App.4th 1409, 1415 (1995) ("The substantial factor standard generally produces the same results in cases as does the 'but for' rule of causation which states that a defendant's conduct is a cause of the injury if

the injury would not have occurred but for that conduct . . . . The substantial factor standard . . . subsumes the 'but for' test while reaching beyond it to address other situations, such as independent or concurrent causes"). Thus, in order to carry their burden of proving causation, plaintiffs must demonstrate that the lack of permanently attached, interlocked safety guards over the printing rollers was a substantial factor in bringing about Gary Furry's injury. Stated otherwise, they must show that but for the lack of such guards, the injury would not have occurred.

The evidence necessary to support such an inference, however, would have to include expert testimony. "'[T]he decisive consideration in determining the [necessity] of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that [persons] of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert [is required].'" *Campbell, supra*, 32 Ca1.3d at 124 (quoting *People v. Cole*, 47 Cal.2d 99, 10; (1956)). Jurors do not have common knowledge of, or experience with, paper converting machines or interlocked safety guards. Thus, merely describing how the injury occurred, and how the guards actually affixed to the machine operated, would not permit the jury to conclude that the absence of permanently attached, interlocked guards was a substantial factor in causing the accident. Rather, an expert would have

to describe how such gu4rds function and how they could have operated to prevent Gary Furry's injury.

In this respect, the situation is distinguishable from that which confronted the court in *Campbell, supra*. There, the California Supreme Court stated that expert testimony was not necessary to prove that the lack of a restraining pole or grab rail on a bus was the proximate cause of plaintiffs injury. *Campbell, supra*, 32 Cal.3d at 124. Applying; the above rule for determining whether expert testimony was necessary, the Court held that, since "(t]he need for a 'grab bar' or pole to steady oneself when a bus turns a sharp corner is a matter within the common experience of lay jurors," no expert was needed to prove causation. *Id.* at 125.

The Court's discussion distinguishing the Court of Appeal's earlier decision in *Truman v. Vargas*, 275 Cal.App.2d 976 (1969), is instructive as to how the rule should be applied in the present case. In *Truman*, the court held that expert testimony was required to establish what injuries would have been prevented by a seatbelt when a car going forty miles an hour came to a sudden stop and crashed into another vehicle. *Truman, supra*, 275 Cal.App.2d at 982-83. While the effect of seatbelts is something ordinarily within the knowledge of lay persons, the court held that non-experts "could only guess" as to the effect a seatbelt would have had upon one propelled forward with great force as a result of the collision. *Id.* at 983. Compare *McNeil v. Yellow Cab Co.*, 85 Cal.App.3d 116, 118 (1978) (holding that the absence of a seatbelt in a collision that threw plaintiff from

the right rear passenger seat to the front left of the vehicle was not a subject that required expert testimony).

Truman stands for the proposition that, even when the safety device at issue is a relatively common one, there will be occasions when a jury cannot be expected to know or appreciate how it will function and whether it could have prevented the injury complained of. *Truman*, supra, 275 Cal.App.2d at 983 ("From what injuries would *Truman* have been saved if he had been using a seat belt? . . . . The nonexpert could only guess"). Here, the need for expert testimony is even stronger, since the product in question is not one within the common knowledge and experience of jurors, and they have no basis for judging whether the presence of permanently attached, interlocked guards would have prevented the accident in question or lessened the severity of the damage.

Indeed, courts routinely require expert testimony to establish causation in cases such as this. See, e.g., *Chandler v. Chiron Corp.*, 176 F.3d 481, 1999 WL 184564, * 1 (9th Cir. 1999) (Unpub. Disp.) (affirming judgment for defendants where plaintiffs proffered no expert testimony regarding causation and thus did not prove a prima facie case: "It is not obvious from common experience that the design [of the surgical device] was the cause [of plaintiff's injury]. The Chandlers argue that the design must have been defective because the [surgical device] would operate with the thickness plate being inserted backwards or too loosely. This may be true, but the Chandlers have presented no

evidence that this defect caused the injury" (emphasis added)); *Bresnahan, supra*, 32 Cal.App.4th at 1565 (because "[p]laintiff's automotive engineering expert would have testified that the injuries would not have occurred had the air bag not deployed," plaintiff satisfied her burden of presenting a prima facie case of causation); *Visueta v. General Motors Corp.*, 234 Cal.App.3d 1609, 1616 (1991) (affirming a judgment for the defendant because there was no causal relationship between the alleged defect - the inaccessibility of the truck's parking brake - and the accident, *inter alia*, since there was no expert testimony that claimed design defect was substantial contributing factor to accident: "Even though expert testimony may not be required to show the parking brake lever was installed in an inaccessible location, lay opinion as to the cause of an automobile collision is not admissible"); *Garcia v. Joseph Vince Co.*, 84 Cal .App.3d 868, 849-50 (1978) (holding that plaintiff failed to establish that a fencing accident was proximately caused by the design of a fencing mask because, *inter alia*, no expert opined that the mask's design caused the injury suffered by plaintiff); *Endicott v. Nissan Motor Corp.*, 73 Cal.App.3d 917, 927 (1977) ("although there is undoubtedly a statistical correlation between absence of seat belt . . . and increased injuries in motor vehicle accidents, . . . expert testimony will normally be necessary to establish proximate cause of injury on the individual facts"). See also *Makuc v. American Honda Motor Co.*, 835 F.2d 389, 392 (1st Cir. 1987) ("The plaintiff argues in essence that, based

on evidence suggesting the [motorcycle] axle was defective, the jury should be allowed to infer that the defendant's negligence more probably than not caused this accident. Based on the evidence presented, however, a jury could not infer that the accident was caused by the defective axle. A motorbike is not a simple device. Rather, it is a product consisting of a number of relatively complex working parts. This sophistication precludes the jury from drawing an inference of causation based on common knowledge");[7] *Browne v. McD6nnell Douglas Corp.*, 698 F.2d 370, 371, n. 1 (9th Cir. 1982) (rejecting plaintiffs' contention that California products liability law strongly favors allowing the jury to infer proximate cause, and distinguishing *Campbell, supra*, because it involved design defects in products "within in the common experience of ordinary consumers," rather than the "sophisticated design [of] the cockpit of a DC-9 [airplane]"); *Ruhland v. Walter Kidde Portable Equipment, Inc.*, 179 F.R.D. 246, 251 (W.D.Wis. 1998) (in products liability action against the manufacturer of a fire extinguisher that allegedly failed to operate when it was used in an

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[7] Compare *Pietrone v. American Honda Motor Co.*, 189 Cal.App.3d 1057, 1061 (1987) (expert testimony was not required to prove that a motorcycle passenger's injuries were proximately caused by the exposed spokes of the rear wheel behind the shock absorber since ". . . no more than a cursory examination of this machine's configuration makes apparent both the danger of its design and potential solutions thereto"). The facts here are distinguishable from those in *Pietrone*, as a cursory examination of the paper converting machine does not reveal any design defects or dangers within the common experience of jurors.

attempt to douse a house fire, the court held that the issues of defect and causation were "sufficiently complex as to require expert testimony and that without such evidence, plaintiffs [could not] meet their burden of proof at trial"); *Rutigliano v. Valley Business Forms*, 929 F.Supp. 779, 783 (D.N.J. 1996) (plaintiff in a products liability action against the manufacturers of carbonless carbon paper, who alleged that she had developed "formaldehyde sensitization" from exposure to the formaldehyde contained in the paper, "require[d] expert testimony to satisfy her burden with respect to both general causation and specific causation"). Cf. *Lunghi, supra*, 153 Cal.App.3d at 490 ("In this sort of [risk-benefit] analysis, the jury necessarily relies heavily on the testimony of experts").

As in these cases, plaintiffs here cannot meet their burden of demonstrating that Gary Furry's injury was proximately caused by the paper converting machine's design in the absence of expert testimony. Because their only expert on the subject has been excluded, defendants are entitled to summary judgment on plaintiffs' strict liability claim.

2. The Impact Of The Federal OSHA Regulations

Plaintiffs contend that, even if expert testimony would ordinarily be required to prove that the lack of permanently attached, interlocked guards proximately caused Gary Furry's injuries, it is not needed because the design of the Bielomatik machine violates Federal Occupational Safety

and Health Administration ("OSHA") standards, raising a presumption of defect and causation. Section 1910.212(a)(2) of Title 29 of the Code of Federal Regulations requires that "[o]ne or more methods of machine guarding . . . be provided to protect the operator and other employees in the machine area from hazards such as those created by . . . ingoing nip points. 29 C.F.R. § 1910.212(a)(1). The regulation also mandates that "[g]uards . . . be affixed to the machine where possible and secured elsewhere if for any reason attachment to the machine is not possible." 29 C.F.R. § 1910.212(a)(2).

California Evidence Code § 669(a) establishes a rebuttable presumption that a person who has violated a statute, ordinance, or regulation designed to prevent the type of injury that occurred has failed to exercise due care if (1) the violation proximately caused the injury and (2) the person injured was within the class of persons the statute or regulation was adopted to protect.[8] California courts have

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[8] California Evidence Code § 669 provides in pertinent part:

"(a) The failure of a person to exercise due care is presumed if: (1) He violated a statute, ordinance, or regulation of a public entity; (2) The violation proximately caused death or injury to person or property; (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

held that "[w]hen the person injured is of the class the regulation[ ] violated is designed to protect and the injury is the type the regulation was promulgated to avoid, there is an *inference the injury proximately flowed from the violation.*" *Fagerquist v. Western Sun Aviation, Inc.*, 191 Cal.App.3d 709, 725 (1987). See also *Haft v. Lone Palm Hotel*, 3 Cal.3d 756, 765 (1970) ("the breach of a statutory duty itself will often suffice to give rise to an inference from which a jury may find that a given injury was the actual and proximate result of the violation"). Whether that inference is sufficient to shift the burden to the defendant depends on the particular facts of the case. See *Fagerquist*, *supra*, 191 Cal.App.3d at 725.

In *McGee v. Cessna Aircraft Co.*, 139 Cal.App.3d 179, 187-88 (1983), the court adopted this burden-shifting mechanism in the context of a strict liability claim. In *McGee*, there was a conflict between experts as to the proximate cause of the crash of a small plane. The aircraft itself had been destroyed. It was possible to ascertain from examining an identical aircraft, however, that the plane did not comply with Federal Aviation Administration ("FAA") regulations that required a fifteen minute firewall between the engine and the cockpit. The court held that failure to

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(b) This presumption may be rebutted by proof that: (1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law . . . ."

provide a fifteen minute firewall was substantially likely to have caused the burn injuries suffered by plaintiff, and was the reason evidence of causation was unavailable to her at trial. Considering plaintiff's negligence claim, the court held that the violation of the federal regulations raised an inference of causation sufficient to shift the burden of proving that the design was not the proximate cause of injury to defendant. *Id.* at 186. It also shifted the burden on plaintiff's strict liability claim. Applying the standard established in *Campbell*, *supra*, it held that "[o]nce the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective." In the case before it, it held that "[v]iolation of the [federal regulations was sufficient to] make this prima facie showing." *Id.* at 187.

Proof of a statutory or regulatory violation will not always permit the jury to infer that the violation caused plaintiff's injury, and to shift the burden of proof to the defendant. In *Fagerquist*, *supra*, 191 Cal.App.3d at 726, the court noted that there was a "strong suggestion that proper maintenance, as required by [the FAA] regulations, would have prevented the accident." It nonetheless distinguished *McGee* on two bases. "First, the evidence was not destroyed by the crash so as to prevent accident reconstruction," and "thus, the policy reasons relied on in . . . *McGee* are not present here." *Id.* "Second, the regulation violations here do

not directly go to the inability of plaintiff to establish proximate causation," and "compliance with the regulatory requirements would not have eased plaintiff's evidentiary burden in proving [that] Western Sun's negligent inspection and maintenance proximately caused the accident." *Id.* On this basis, the court held that the trial judge had erroneously instructing the jury that if it found a statutory violation, the burden shifted to the defendant to prove that the violation was not a proximate cause of plaintiff's injury. *Id.* at 723, 726.[9]

As these cases make clear, evidence of statutory or regulatory violations is generally admissible to prove a failure to exercise due care under Evidence Code § 669. Whether such violations also give rise to an inference of causation for purposes of proving negligence or strict liability, and shifting the burden on that issue to defendant, however, depends on whether it is possible to draw a direct causal link between the violation and the injury sustained by plaintiff, and whether the violation has rendered it more difficult or impossible for plaintiff to present evidence of causation during his or her case in chief.

With these principles in mind, it is necessary to examine whether, in this diversity action governed by

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[9] The court of appeal in *Fagerquist* was concerned only with the propriety of the trial court's negligence instructions, since the defendant retailer conceded liability on the strict liability count. See *Fagerquist, supra*, 191 Cal.App.3d at 715.

California law, federal OSHA standards are the type of regulations whose violation can support an inference of causation sufficient to shift the burden of proving that the product is not defective to a strict liability defendant.

(a) OSHA Regulations Are Inadmissible Against A Manufacturer Under California Law

When Congress enacted federal OSHA in 1970, it included a provision permitting individual states to regulate workers' health and safety, provided the scheme of regulation and enforcement was at least as vigorous as that mandated by federal OSHA. See 29 U.S.C. § 667 (1982). Pursuant to this invitation, California enacted the California Occupational Safety and Health Act of 1973, Labor Code §§ 6300 et seq. ("Cal/OSHA"), which was subsequently approved by the Secretary of Labor. See 29 U.S.C. § 667(c). When the governor later attempted to withdraw the state plan, and return enforcement to the federal government, the voters passed Proposition 97. This measure amended Labor Code § 50.7 as follows:

> "The Department of Industrial Relations is the state agency designated to be responsible for administering the state plan for the development and enforcement of occupational safety and health standards relating to issues covered by corresponding standards

> promulgated under the federal Occupational Safety and Health Act of 1970 . . . ." Labor Code § 50.7(a).

The preamble to Proposition 97 stated in pertinent part:

> "It is the purpose of this Act to restore California control over private sector safety and health, which the state has provided for since 1913, and has administered since 1973 through Cal/OSHA. Pursuant to Article XIV, Section 4, of the California Constitution, state jurisdiction over worker safety and health should not be limited, eliminated or otherwise restricted, unless absolutely required by the Federal Constitution." (Prop. 97, § 1, subd. (10).)

Thus, the effect of the enactment was to substitute state standards of equal rigor for the otherwise applicable federal standards, and to establish that those state standards would govern workplace safety in California. See *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 864 (9th Cir. 1987), cert. denied, 486 U.S. 1054 (1988). For this reason, the only safety regulations applicable in California are those contained in the California Labor Code.

As respects these regulations, the California Legislature has specifically prohibited their consideration or admission into evidence in a civil trial against a party other

than an injured worker's employer. Labor Code § 6304.5 states:

> "It is the intent of the Legislature that the provisions of this division [setting out state-prescribed safety regulations] shall only be applicable to proceedings against employers brought pursuant to Chapter 3 (commending with Section 6500) and 4 (commencing with Section 6600) or Part 1 or this division for the exclusive purpose of maintaining and enforcing employee safety.
>
> "Neither this division nor any part of this division shall have any application to, nor be considered in, nor be admissible into, evidence in any personal injury or wrongful death action arising after the operative date of this section, except as, between an employee and his own employer."

Cases interpreting this provision have clearly held that Cal/OSHA regulations are inadmissible except in actions by employees against their employer. See *Widson v. International Harvester Co.*, 153 Cal.App.3d 45, 51-52 (1984) ("Every appellate court in the State of California which has considered the question of legislative intent of this section has concluded Cal-OSHA regulations are not applicable to nor admissible in an employee's action against

a third person not his employer"). Some courts have held specifically that evidence of Cal/OSHA violations is not admissible to prove or disprove a design defect in a products liability case. See *Id.* (excluding defendant/manufacturer's evidence of Cal/OSHA regulations, offered in defense of its design); *Salinero v. Pon*, 124 Cal.App.3d 120, 130-31 (1981) (holding that § 6304.5 makes it "abundantly clear" that evidence of Cal/OSHA regulations is "not admissible in any third party actions by an employee . . . . The exclusion of the enumerated Labor Code provisions in third-party cases is all-encompassing; no exceptions are stated"); *Spencer v. G.A. MacDonald Constr. Co.*, 63 Cal.App.3d 836, 857 (1976) ("The meaning [of § 6304.5] could not be clearer; the safety orders are not admissible in evidence in third party actions by an employee").

It would circumvent this clear expression of state policy to allow plaintiffs to introduce evidence of federal OSHA standards as evidence of causation in their case-in-chief. It would ignore federal policy as well, which recognizes that states may enact their own equally rigorous regulations governing workplace safety and thereby supplant federal standards. The authority for admitting such evidence under California law would be Evidence Code § 669, which permits the trier of fact to presume that a person who has violated a statute, ordinance, or regulation has failed to exercise due care. Since both Cal/OSHA and federal OSHA regulations set standards for employers' conduct, it is

difficult to discern how they can be "violated" by a third-party manufacturer such as Bielomatik.

For this reason, many federal courts have refused to admit evidence of federal OSHA violations against a manufacturer in products liability cases. See, e.g., *Minichello v. U.S. Industries, Inc.*, 756 F.2d 26, 29 (1985) ("OSHA regulations are not relevant to the issue of U.S. Industries' liability to the Minichellos for a further reason. OSHA regulations pertain only to employers' conduct"); *McKinnon v. Skil Corp.*, 638 F. 2d 270, 275 (1st Cir. 1981) ("the trial court did not abuse its discretion in refusing to admit the OSHA regulation -When it ruled that OSHA workplace standards were not relevant in this consumer product liability action against a manufacturer"). See also *Dixon v. International Harvester Co.*, 754 F.2d 573, 581 , (5th Cir. 1985) ("Harvester . . . argues that the OSHA regulations were inadmissible because Harvester was not Dixon's employer. Although this position is not without some merit, we need not resolve that question today"); *Rabon v. Automatic Fasteners, Inc.*, 672 F.2d 1231, 1238 and n. 15 (5th Cir. 1982) (noting that the violation of an OSHA regulation can be evidence of negligence or even, in appropriate circumstances, negligence per se, the court nonetheless questioned the relevance of OSHA regulations in the case before it as the proponent was not the employer).[10]

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[10] Even where suit is brought against the employer, federal courts generally do not hold that the violation of federal OSHA standards

constitutes negligence per se. The federal Occupational Safety and Health Act provides:

> "Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of employment. " 29 U.S.C. § 653(b)(4).

Citing this provision, a majority of federal courts allow the introduction of evidence that federal OSHA standards have been violated to prove the applicable standard of care, but not to establish an employer's negligence per se. See, e.g., *Robertson v. Burlington Northern R.R. Co.*, 32 F.3d 408, 410-11 (9th Cir. 1994) (in an FELA action against a railroad employer, the court held that "OSHA standards may be admitted in a FELA case as some evidence of the applicable standard of care. Such evidence, however, is to be considered only in relation to all other evidence in the case, and a violation of an OSHA regulation is not negligence per se"); *Ries v. National R.R. Passenger Corp.*, 960 F.2d 1156, 1162 and n. 5 (3d Cir. 1992) (holding, in an FELA action against an employer, that while the "admission of an OSHA violation as evidence of negligence would not contradict [the court's] interpretation of the 'enlarge or diminish or affect' language of OSHA," the result would be different "[i]f a violation of an OSHA regulation could constitute negligence per se and bar contributory negligence under the FELA," since in that situation "it would be almost axiomatic that the effect would be to 'enlarge or diminish or affect' the statutory duty or liability of the employer"); *Albrecht v. Baltimore & Ohio R.R. Co.*, 808 F.2d 329, 332 (4th Cir. 1987) (holding, in an FELA action against a railroad, that district court did not err in instructing the jury that it might consider an OSHA violation as evidence of negligence).

Even were such evidence admissible against a manufacturer, none of the cases suggest; that it would establish either the causation element of plaintiffs' prima facie case. Consequently, because federal OSHA standards are not standards designed to govern the conduct of manufacturers, and because they are not operative in California, the court concludes that plaintiffs cannot meet their burden of proving proximate cause by introducing evidence that the design of the paper converting machine violated federal OSHA regulations.

(b) Furry Has Not Shown That § 1910.212(a)(2) Was Violated In Any Event

Even assuming that § 1910.212(a)(2) could be considered in evaluating whether plaintiffs' have proved a prima facie case of causation, they have proffered no evidence that the regulation was violated. Plaintiffs assert "[t]here is no question that the subject guards were not affixed or attached to the Bielomatik P-581 machine."[11] This, however, is not quite accurate. It is true that the safety guards were not permanently attached to the machine. The regulation, however, requires only that guards be "affixed to the machine where possible and secured elsewhere if for any reason attachment to the machine is not possible." 29 C.F.R.

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[11] Pl.'s Opp. at 15:8-9.

§ 1910.212(a)(2). Bielomatik contends the guards were attached to the machine, but were removable in order to allow for periodic cleaning of the printing rollers. Comparing the design of the machine to the language of the federal OSHA regulation, it is not obvious that Bielomatik violated the federal standard.[12] As a result, expert testimony would be necessary to assist in determining the proper interpretation and application of the regulation. See, e.g., *Hasenauer v. Celotex Corp.*, 1996 WL 481529, *7 (E.D.Pa. 1996) (granting, a new trial because an expert's testimony regarding the proper interpretation and application of OSHA standards was conclusory, and the bases for it were not clearly stated, but accepting the notion that properly supported testimony of this type would be admissible). See also *Globe Contractors, Inc. v. Herman*, 132 F.3d 367, 372 (7th Cir. 1997) (discussing the admission of the expert testimony of a former OSHA supervisor concerning the meaning of an ambiguous term in an OSHA regulation). Compare *Northern Heel Corp. v. Compo Industries, Inc.*, 851 F.2d 456, 468 (1st Cir. 1988) (upholding the district court's exclusion of an expert's opinion regarding the proper interpretation of OSHA regulations on the basis that it would not assist the trier of fact).

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[12] The regulation is completely silent respecting plaintiffs' other complaint that the guards were not interlocked.

Consequently, even if it were possible for plaintiffs to satisfy their burden of proving causation solely by introducing evidence that Bielomatik's machine violated federal OSHA standards, expert testimony would be required to establish that the machine's design in fact violated § 1910.212(a)(2). For this reason, plaintiffs' reliance on federal OSHA standards as proof of proximate cause is unavailing.

b. Failure To Equip The Machine With An Emergency Shut-Off Device

The second design defect about which plaintiffs complain is the absence of an emergency shut-off device on the paper converting machine. Had the Bielomatik machine been equipped with such a "suicide line," plaintiffs contend, Gary Furry's injuries would have been substantially less severe. In support of this claim, they cite the testimony of Bielomatik's expert, George Karosas, and the testimony of Dr. Mark Mandel.[13]

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[13] In opposition to defendants' summary judgment motion, plaintiffs have submitted numerous depositions and sworn statements. As to each, they state that they "offer the entirety [of the deposition or statement] in evidence." (See, e.g., Expert Trial Testimony of Dr. Mark Mandel, M.D. Submitted in Opposition to Defendants' Motion for Summary Judgment at 1:2526; Deposition of George Karosas Submitted in Opposition to Defendants' Motion for Summary Judgment at 2:1.) The Local Rules require that plaintiffs identify those portions of the testimony that they proffer in opposition to summary judgment. See *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538, 1545 (9th Cir. 1988) (when a local rule such as Local Rule

At his deposition, Karosas testified that if one *assumed* the paper converting machine had been equipped with an emergency shut-off device,[14] and *assumed* Gary Furry had been able to reach it,[15] the machine would have come to a stop within ten seconds after the shut-off device was activated,[16] and the rollers would have rotated only twenty-six times *after* the stop button was depressed.[17] Dr. Mandel, in turn, testified that Gary Furry's hand would not have required amputation if the rollers had passed over it only 26 times, and that has injuries would not have been serious.[18] Neither witness, however, testified regarding the location of the hypothetical shutoff device, whether Furry

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7.14.3 "has been promulgated, it serves as adequate notice to nonmoving parties that if a genuine issue exists for trial, they must identify that issue and support it with evidentiary materials, without the assistance of the district court judge"); *Davis v. State of California Department of Corrections*, 1996 WL 271001 (E.D.Cal.1996) (addressing a similar rule in the Eastern District of California, the court stated: "The case before the court seems particularly appropriate for the application of this rule, where the parties have introduced many thousands of pages of deposition testimony. The parties, not the court, have the responsibility of identifying those facts that support their case"). Here, in addition to "offer[ing] the entirety" of the testimony, plaintiffs have identified certain portions of the transcripts to which they "particularly direct[ ] the court's attention." The court has reviewed the cited excerpts of the transcript in evaluating the issues raised by the motion.

[14] Deposition of George Karosas ("Karosas Depo.") at 172:7-14.

[15] *Id.* at 172:17-18.

[16] *Id.* at 172:17-21.

[17] *Id.* at 172:17-173:18.

[18] Deposition of Mark Mandel ("Mandel Depo.") at 57:8-60:10.

would have been able to reach it after his hand became engaged in the printing rollers, or how long, on average, it would have taken someone such as Furry to activate the device.

In support of their assertion that the combined testimony of Karosas and Mandel meets their burden of proving proximate cause, plaintiffs rely heavily on the holding in *Bates v. John Deere Co.*, 148 Cal.App.3d 40, 46 (1983). In that case, however, the plaintiff introduced expert testimony addressing each of the elements missing here. Specifically, "[p]laintiff's engineering expert . . . testified that the design of model 699H was defective because it failed to include an emergency cutoff switch located near the picking heads." *Id.* As support for this opinion, the expert stated "that an operator would be able to reach a switch located at the top of the picking head for most types of accidents and that the reaction time for actuating such a switch would be within two seconds after becoming caught in the machine. Thus, it was his opinion that an operator who knew that the switch existed would be able to shut the machine down within four to five seconds after becoming entangled in the machine." *Id.* at 46-4.7. In determining that plaintiff had adequately established proximate cause, the court noted that

> "it was the opinion of two physicians, plaintiff's engineering expert, and numerous farm laborers who had themselves been injured in cotton picker

> accidents, that plaintiff *would have had enough time to actuate an emergency cutoff switch* after being caught by the machine and thereby avoid sustaining any serious disabling injury. This evidence overwhelmingly establishes a causal relationship between the absence of a cutoff switch *near the picking heads* and the seriousness of the injury suffered by plaintiff." *Id.* at 49 (emphasis added).

Neither Karosas nor Dr. Mandel testified as to where a suicide line could (or should) have been located on the Bielomatik machine. Nor is there any other evidence in the record on this score. At oral argument, plaintiffs' counsel cited a videotape depicting a linoprint machine equipped with a suicide line that is made by a competitor of Bielomatik -- Hickok.[19] While the court has examined this videotape, it does not provide evidence regarding the placement of a suicide line on Bielomatik's machine. Specifically, there is no evidence in the record regarding the similarities (or differences) in design between the Hickok and Bielomatik machines. The Hickok videotape provides no information as to where a suicide line might have been placed on the Bielomatik machine, or whether, given the mechanics of that machine, it would have worked in the

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[19] Declaration of Garry Furry in Opposition to Defendants' Motion for Summary Judgment ("Furry Decl."), Ex. C.

same fashion as the one depicted in the videotape.[20] There is also no evidence as to how close such a line would have been to Gary Furry's location at the time of the accident, or whether he would have been able to reach and activate it.[21]

Thus, plaintiffs have proffered no evidence regarding a variety of facts essential to inferring causation. Compare *Bates, supra*, 148 Cal.App.3d at 46. See also *Klingovsky, v. Mestek, Inc.*, 1998 WL 841196, * 6 (Ohio App. 1998) (expert's testimony "helped the [plaintiffs] establish a genuine issue of material fact on these issues when he state[d] that an emergency control device should have been located near the tension stand as it was foreseeable that workers would be located near and working with the tension rolls and the nearest control panel with an emergency stop

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[20] While Charles Furry's declaration provides additional information regarding the Hickok machine, none of his statements address the similarities between the machines, the possible location on the Bielomatik machine of a suicide line, or the spatial relationship between the hypothetical location of the line and the position of the operator. (See Declaration of Charles Furry in Opposition to Defendants' Motion for Summary Judgment ("Charles Furry Decl. "), 11 5-7.) The Karosas deposition excerpt and certain of the sworn statements proffered by plaintiffs purportedly contain footage of the machine on which Furry was injured. While there are certain similarities between this machine and the Hickok linoprint machine depicted in Exhibit C, there also appear to be substantial differences. Without expert testimony, lay jurors would have no basis to conclude that a suicide line could have been placed on the Bielomatik machine in the same position as on the Hickok machine.

[21] The Hickok videotape does not show a worker actually operating the machine; rather, it depicts an individual walking around the machine to point out certain of its features. (See Furry Decl., Ex. C.)

button was not adequately accessible"); *Lenherr v. NRM Corp.*, 504 F.Supp. 165, 173 (D.Kan. 1980) (an expert testified that plaintiff's injuries would have been minor if a squeegee machine had been equipped with a foot-operated panic bar, as the rollers in which plaintiff's hand was caught rotated at a speed of four to five seconds per revolution, it took plaintiff 14-20 seconds to shut off the machine using a stop button on the machine, and the amount of time it would generally have taken a man of plaintiff's age to hit the panic bar was only three seconds). Cf. *Gokey v. Castine*, 558 N.Y.S.2d 308, 310 (1990) ("Plaintiffs have submitted expert opinion concerning defects in the design of the forage harvester, including the lack of emergency stop switches *in the location where [plaintiff] was injured*" (emphasis added)). Moreover, where a suicide line might have been located, and how it might have worked, are not subjects within the common experience of jurors. Thus, expert testimony would be required to establish a prima facie case of causation based on the lack of a suicide line.

Similarly, plaintiffs have adduced no competent evidence regarding the normal reaction time of an individual involved in an accident of this type, and thus have failed to raise an inference that Gary Furry would have had sufficient time to reach "a shut-off device before sustaining disabling

injuries to his hand.[22] See *People v. Atchley*, 53 Cal.2d 160, 176 (1959) ("mental stress created by [a traumatic event] and the effect of such stress on finger reflexes. . . were sufficiently beyond common experience that the opinion of an expert would assist the trier of fact"); *Ashley v. Hall*, 138 Wash.2d 151, 157 (Wash. 1999) (holding that expert

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[22] Indeed, based on plaintiffs' argument, Gary Furry would have had to pull a suicide line or depress an emergency cut-off switch the minute his hand became engaged to avoid disabling injuries. Karosas testified that it would have taken ten seconds for the machine to shut down once a shut-off device had been activated. He also stated that the printing rollers would turn twenty-six times between activation of the device and actual shut-down. Dr. Mandel testified that no disabling injuries would have been suffered had the rollers passed over Furry's hand only twenty-six rotations. These assumptions, however, leaves Furry no time to reach the shut-off device, activate it and avoid serious injury to his hand. Dr. Mandel opined that amputation would have been required if the rollers passed over Furry's hand between 100 to 200 times. (See Deposition of Dr. Mark Mandel ("Mandel Depo.") at 66:15-17.) Based on the calculated speed of the rollers (see *Id.* at 57:11-13), therefore, it would have been necessary to extract Furry's hand from the machine in approximately 42 to 84 seconds in order to avoid disabling injuries (see *Id.* at 61:4-9). Accepting these assumptions, Furry would have had to activate the shut-off mechanism within 30 to 70 seconds after his hand became engaged to avoid amputation. There is no evidence in the record, however, from which jurors could infer that a shut-off device could have been activated this quickly. Gary Furry's declaration, while offering certain observations regarding the length of time his hand was caught in the machine, and the points at which additional fingers became engaged, provides no information as to how quickly he might have reacted had the machine been equipped with a suicide line. (See Furry Decl., ¶¶ 3-11.)

testimony was required to determine the reaction time of a driver in an automobile accident).[23]

For both reasons, plaintiffs have not established a causal link between the lack of an emergency shut-off device and the injuries sustained. Stated otherwise, even assuming the machine had been equipped with such a device, there is no proof that Furry would have avoided injury or that his injuries would have been less severe. Consequently, plaintiffs cannot meet their burden of proving proximate cause. See *Visueta*, *supra*, 234 Cal.App.3d at 1616 ("Phrased otherwise, if the collision would have occurred even if the parking brake '. . . had been properly located, its location was not a substantial factor in bringing about the . . . [collision] and was therefore not a contributing cause thereof" '). See also *Endicott*, *supra*, 73 Cal.App.3d at 927 ("although there is undoubtedly a statistical correlation between absence of seat belt . . . and increased injuries in motor vehicle accidents, . . . [p]laintiff's evidence merely presented a general probability of enhanced injury from nonuse of seat belts"); *Truman*, *supra*, 275 Cal.App.2d at

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[23] For this reason, the testimony of Bruce Meredith, even if admissible, does not create a triable issue of fact. (See Sworn Statement Under Penalty of Perjury of Bruce Meredith in Opposition to Motion for Summary Judgment at 122:18-123:4 [testimony of Meredith, who was injured when he slipped and caught his hand in a Bielomatik paper converting machine, that he believes some of his hand would have been saved if there had been an emergency shut-off device or suicide line available]).

982-84. See generally Aaron Gershonowitz, What Must Cause Injury in Products Liability?, 62 IND.L.J. 701, 717-24, 723 (1986-87) (interpreting several California court decisions and arguing that "[p]laintiffs who claim design defects will now have to provide expert testimony concerning a feasible alternative design, because without such testimony they will be unable to show that the design of the product caused the injury").

c. Failure to Warn

A manufacturer is liable for its failure to warn of dangers that were scientifically or medically known at the time it manufactured or distributed its product. *Carlin v. Superior Court*, 13 Cal.4th 1104, 1112 (1996); *Anderson, supra*, 53 Cal.3d at 1003. "If directions or warnings as to the use of a particular product are reasonably required in order to prevent the use of such product from becoming unreasonably dangerous, the failure to give such warnings or directions, if any, renders the product defective . . . ." *Barth v. B.F. Goodrich Co.*, 265 Cal.App.2d 228, 244 (1968). See also *Wright v. Stang Mfg. Co.*, 54 Cal.App.4th 1218, 1230 (1997) ("'Under "warning defect" strict liability, a product, even though faultlessly made, is defective if it is "unreasonably dangerous to place . . . in the hands of a user without a suitable warning and the product is supplied and no warning is given." . . . It is now settled that "knowledge or knowability [of the danger] is a component of strict liability for failure to warn"'"); *Huynh v. Ingersoll-Rand*, 16 Cal.App.4th 825 (1993) ("'[A] manufacturer owes a

foreseeable user of its product a duty to warn of risks of using the product'" (quoting *Powell v. Standard Brands Paint Co.*, 166 Cal.App.3d 357, 362 (1985)); *Harris v. Belton*, 258 Cal.App.2d 595, 606 (1968); *Jackson v. Coast Paint and Lacquer Co.*, 499 F.2d 809, 811 (9th Cir. 1974). A plaintiff may recover from the manufacturer even if the product is used in a manner not intended by it, and therefore unanticipated by warnings or other instructions, so long as the unintended use is reasonably foreseeable. *Horn v. General Motors Corp.*, 17 Cal.3d 359, 367 (1976).

Plaintiffs contend it was reasonably foreseeable that a user of the Bielomatik paper converting machine would try to clean the printing rollers while the machine was in operation. In this respect, they cite the case of *Rosalez v. Bielomatik*, in which Rosalez alleged that he sustained injuries to his hand while cleaning the printing rollers of a Bielomatik paper converter. Bielomatik has acknowledged that it was aware of this case.[24] Assuming this evidence is sufficient to demonstrate that the possibility of the type of injury suffered by Gary Furry was reasonably foreseeable, the question becomes whether the particular warning plaintiffs claim should have been given is of the type that will support the imposition of strict liability for failure to warn.

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[24] Defendant's Written Discovery Responses Submitted In Opposition To Defendant's Motion For Summary Judgment, Ex. A, P. 6.

Typically, cases holding a manufacturer strictly liable in tort for failure to warn involve the absence of warnings concerning the dangers inherent in the misuse of a machine or piece of equipment. Plaintiffs here do not make such a claim. They do not assert that Bielomatik failed to warn users of the dangers of cleaning the printing rollers with one's hand or with a rag while the machine was in operation.[25] Rather, they assert that Bielomatik failed to advise users how to shut the machine down if they became caught in the rollers while trying to clean them. In this regard, plaintiffs cite the testimony of Bielomatik employee Wilhelm Loewer, who stated that an operator could shut the machine off "by just hitting against the web."[26] Had Bielomatik provided such an instruction, plaintiffs contend,

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[25] Gary Furry testified, in fact, that he knew from his first day on the job of the risks involved in placing his hand into the machine while it was running. (Deposition of Gary Furry ("Furry Depo.") at 108:4-12.) Whether, given this admission, plaintiffs could prevail on a claim that Bielomatik failed to warn of the dangers inherent in trying to clean the printing rollers while they were moving would depend on proper application of assumption of the risk principles. See *Weight, supra*, 54 Cal.App.4th at 1232-33 (holding that the trial court improperly found there was no duty to warn about a seventeen-year old component part where the manufacturer failed to establish primary assumption of the risk, i.e., that it owed no legal duty to protect plaintiff from particular risk of harm that caused the injury). As a failure to warn of the dangers inherent in using one's hand or a rag to clean the rollers while they were running is not the failure about which plaintiffs complain, however, the court need not analyze this issue.

[26] Deposition of Wilhelm Loewer ("Loewer Depo.") at 43:15-19.

Furry would have understood that he could stop the machine by breaking the web, and could have avoided serious injury. In this regard, Furry has submitted a declaration stating that the rollers would have come to a stop within thirty seconds after the web of paper was broken.[27] Invoking Dr. Mandel's testimony, plaintiffs conclude that Furry's injuries would have been substantially less severe had he been warned.[28]

The court knows of no authority imposing a duty on Bielomatik to instruct users how to minimize injury in the event they elect to misuse the machine. Rather, as noted earlier, manufacturers are required to warn of the risks

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[27] Furry Decl., 1 13. He bases this opinion on his observation of the machine on numerous occasions when the web of paper was broken.

[28] The cases plaintiffs cite in support of this proposition are inapposite, since they do not address the scope of a manufacturer's duty to warn, but rather involve liability for failure to design a product in a manner that anticipates misuse. See *Thompson v. Package Machinery Inc.*, 22 Cal.App.3d 188, 196 (1972) (finding the manufacturer of a machine strictly liable in tort because alteration or misuse of the machine was reasonably foreseeable, and the manufacturer was obligated to use reasonable care in designing the equipment to protect against foreseeable dangers); *Buccery v. General Motors Corp.*, 60 Cal.App.3d 533, 544 (1976) ("Although a collision may not be the 'normal' or intended use of a motor vehicle, vehicle manufacturers must take accidents into consideration as reasonably foreseeable occurrences involving their products"); *Bates, supra*, 148 Cal.App.3d at 50 (finding that it is "foreseeable to a manufacturer that workers will make mistakes and will do things they should not do around a rotating machine," and thus holding a manufacturer liable for failing to equip its machine with an emergency cut-off switch that would have mitigated against foreseeable misuse).

inherent in foreseeable misuses of the product. *Huynh, supra*, 16 Cal.App.4th at 833. Even if there were a duty to warn about methods of minimizing injury, however, plaintiffs have not adduced sufficient evidence to demonstrate that a warning about breaking the web of paper would have lessened the severity of Gary Furry's injuries. Plaintiffs rely on Dr. Mandel's testimony that Furry's injuries would have been substantially less serious if his hand had been engaged for only ten seconds. To this they add Furry's statement that the machine would have stopped within thirty seconds after the web of paper was broken. While Dr. Mandel also testified that amputation would not have been required if the rollers had passed over Furry's hand less than 100 to 200 times, and there is evidence that this number of revolutions would have been completed in approximately 42 to 84 seconds,[29] there is no evidence as to how many seconds would have been consumed actually breaking the web, nor, on average, how many seconds it would have taken before an operator such as Furry reacted by trying to break the web. Absent such evidence, there is no basis upon which to conclude that the lack of a warning proximately caused amputation of Furry's hand. See *West, supra*, 174 Cal.App.3d at 858-59 (holding that the evidence was sufficient to raise an inferenee that plaintiff's injuries were proximately caused by the manufacturer's failure to warn of the risk of toxic shock syndrome because it showed

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[29] See note 22, *supra*.

that plaintiff had at some point read the instructions provided with the product and thus would have seen a warning had one been provided).

Nor is there any evidence regarding the impact that a warning about breaking the paper web would have had. In this case, such evidence would have to be provided by an expert, who could testify to the reactions of workers in industrial environments, and opine as to whether an effective warning could have been crafted. See *Dimond v. Caterpillar Tractor Co.*, 65 Cal.App.3d 173, 181 and n. 6 (1976) (holding that plaintiff's evidence, including expert testimony regarding the ambiguity of a warning provided by the manufacturer, was sufficient to establish the elements of a prima facie case, including causation). Given the exclusion of their expert, plaintiffs will not be able to introduce such testimony, and Bielomatik's motion for summary judgment on the strict liability failure to warn count must, accordingly, be granted.

D. Manufacturing Defect

Plaintiffs next contend that the Bielomatik machine was defectively manufactured since it differed from other units of the same product line. "A manufacturing defect is readily identifiable in general, because the defective product is one that 'comes off the assembly line in a substandard condition' in comparison with the other identical units." *Lee v. Electric Motor Division*, 169 Cal.App.3d 375, 383 (1985). Here, the "manufacturing defect" of which plaintiffs complain is not a manufacturing defect at all. Plaintiffs do

not assert that one of the machine components was faulty or improperly attached during the manufacturing process. Rather, they contend that the model of paper converting machine sold to Gary Furry's employer was defectively designed, in that it did not contain the interlocked guards attached to similar machines sold in Europe. Plaintiffs cannot recast their design defect claim in order to avoid the entry of judgment. Accordingly, Bielomatik is entitled to summary judgment as a matter of law on plaintiffs' defective manufacture claim.

E. Negligence

In its order directing that defendants file the instant motion, the court noted that a key element of any negligence claim is establishing the standard of care to which a reasonable individual in defendant's position would have adhered. Where the allegedly negligent act involves product design or manufacture, expert testimony is generally necessary to establish this standard. See *Miller v. Los Angeles County Flood Control District*, 8 Cal.3d 689, 702-03 (1973) (noting, in the context of a negligence claim against a home builder, that "[i]f the matter in issue is one within the knowledge of experts only and not within the common knowledge of laymen, it is necessary for the plaintiff to introduce expert opinion evidence in order to establish a prima facie case," and holding that "[t]he average layman has neither training nor experience in the construction industry and ordinarily cannot determine whether a particular building has been built with the requisite skill and in

accordance with the standards prescribed by law or prevailing in the industry"). See also *Bogosian v. Mercedes-Benz of North Am., Inc.*, 104 F.3d 472, 475 (1st Cir. 1997) (upholding the trial court's grant of summary judgment where plaintiff failed to establish the standard of care governing the installation of park ignition interlock mechanisms by automobile distributors); *Hull v. Eaton Corp.*, 825 F.2d 448, 455 (D.C. Cir. 1987) (affirming summary judgment for the manufacturer of a forklift on, *inter alia*, a negligence claim because plaintiffs failed to produce expert testimony as to whether a reasonable manufacturer would have selected a safer design). Plaintiffs will not be able to adduce any expert testimony establishing the standard of care to which Bielomatik should be held, and thus will not be able to prove a prima facie case of negligence. Consequently, Bielomatik's motion for summary judgment on this count must be granted.[30]

F. Retrofit Campaign

Plaintiffs' claim that defendants are liable because they failed to conduct a retrofit campaign also requires proof that Bielomatik acted below the standard of care. Specifically, plaintiffs must prove that after learning of one or more injuries to a user who placed his hand in the in-running nip points of the rollers, the standard of reasonable

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[30] To the extent plaintiffs might seek to prove negligence per se by introducing evidence that federal OSHA standards have been violated, they cannot sustain their burden for the reasons set forth at pages 14-21, *supra*.

care in the industry required that Bielomatik conduct a retrofit campaign to equip all existing machines in service with permanently attached, interlocked safety guards. See *Hernandez v. Badger Construction Co.*, 28 Cal.App.4th 1791, 1827 (1994) ("Failure to conduct an adequate retrofit campaign may constitute negligence apart from the issue of defective design"); *Lunghi, supra*, 153 Cal.App.3d at 494 ("A finding that [defendant] had not met the standard of reasonable care with regard to . . . [its] duties [to warn and conduct a retrofit campaign] would have had some support in the evidence, and would have been consistent with a finding that the product's design was not defective"). Since plaintiffs cannot proffer evidence regarding the applicable standard of care in the industry without expert testimony, they cannot prove a prima facie case of negligent failure to conduct a retrofit campaign. Accordingly, Bielomatik's motion for summary judgment on this claim must be granted.

III. CONCLUSION

For the foregoing reasons, Bielomatik's motion for summary judgment is granted.

DATED: June 2, 1999

MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GARY FURRY and REGINE FURRY, Plaintiffs, vs. BIELOMATIK, INC., a corporation, aka BIELOMATIK LEUZE GMBH & CO., and MATIK NORTH AMERICA, Defendants.	CASE NO. CV 98-2600 MMM (Anx) JUDGMENT FOR DEFENDANT BIELOMATIK LEUZE GMBH & CO. (FILED January 26, 2001) (ENTERED January 29, 2001)

The motion of defendant Bielomatik Leuze GMBH & Co. for summary judgment came on regularly for hearing on July 19, 1999. The court having considered the evidence presented by the parties, and having reviewed the briefs and heard the argument of counsel,

IT IS ORDERED AND ADJUDGED

1. That plaintiffs Gary and Regine Furry take nothing by way of their complaint against Bielomatik Leuze GMBH & Co.;

2. That the action be, and it hereby is, dismissed; and

3. That defendant Bielomatik Leuze GMBH & Co. recover its costs of suit herein.

DATED: January 25, 2001

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MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARY FURRY; REGINE FURRY, Plaintiffs - Appellants, v. BIELOMATIK, INC., et al., Defendants - Appellees.	)	No. 01-55442 D.C. No. CV 98-2600-MMM ORDER (FILED April 5, 2002)

The court, on its own motion, grants the late filing of appellee's petition for rehearing.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARY FURRY, et a;/,	)	No. 01-55442
	)	
Plaintiffs - Appellants,	)	D.C. No. CV 98-2600-MMM
	)	
v.	)	Central District of California, Los Angeles
	)	
BIELOMATIK, INC., et al.,	)	
	)	
Defendants – Appellees.	)	ORDER
	)	
		(FILED May 3, 2002)

Appeal from the United States District Court
for the Central District of California
Margaret Morrow, District Judge, Presiding

Argued and Submitted March 5, 2002
Pasadena, California

Before: WARDLAW and W. FLETCHER, Circuit Judges and FOGEL,* District Judge.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing an banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Jeremy D. Fogel, United States District Judge for the Northern District of California, sitting by designation.